The Law Commission

Working Paper No. 86

Transfer of Land
Liability for Chancel Repairs

LONDON
HER MAJESTY'S STATIONERY OFFICE
£2.50 net

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are -

The Honourable Mr Justice Ralph Gibson, Chairman
Mr Stephen Cretney
Mr Brian J. Davenport, Q.C.
Mr Stephen Edell
Dr Peter North

The Secretary of the Law Commission is Mr J.G.H. Gasson and its offices are at Conquest House, 37-38 John Street, Theobald's Road, London WC1N 2BQ.

This Working Paper, completed for publication on 13 June 1983, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 31 October 1984.

All correspondence should be addressed to -

Mr J.D. Saunders
Law Commission
Conquest House
37-38 John Street
Theobald's Road
London WC1N 2BQ
(Tel: 01-242 0861, ext. 266)

The Law Commission

Working Paper No. 86

TRANSFER OF LAND
LIABILITY FOR CHANCEL REPAIRS

LONDON
HER MAJESTY'S STATIONERY OFFICE

© *Crown copyright 1983*
First published 1983

ISBN 0 11 730166 3

THE LAW COMMISSION

WORKING PAPER NO.86

TRANSFER OF LAND

LIABILITY FOR CHANCEL REPAIRS

CONTENTS

		Paragraph	Page
PART I	INTRODUCTION	1.1-1.7	1-3
PART II	HISTORY OF THE LIABILITY	2.1-2.30	4-21
	Background	2.1-2.4	4-5
	Advowsons	2.5	5
	Monastic rectors	2.6-2.7	5-6
	Laicization of monastic rectories	2.8-2.9	6-7
	Tithes	2.10-217	8-13
	Glebe	2.18-2.23	13-16
	Corn rents, etc.	2.24-2.25	16-17
	Redeemed tithe rentcharges, corn rents, etc.: and the Limitation Act	2.26-228	17-20
	Summary	2.29-2.30	20-21
PART III	FEATURES OF THE LIABILITY AS THE LAW NOW STANDS	3.1-3.15	22-29
	The meaning of "repair" in this context	3.2	22
	Personal liability: and its consequences	3.3-3.5	23-24
	The liability is, in principle, several in nature	3.6-3.7	24-25
	The meaning of "owner" in this context	3.8-3.11	25-27
	Enforcement	3.12-3.13	27-28
	Compounding the liability	3.14-3.15	29

		Paragraph	Page
PART IV	WALES	4.1-4.5	30-32
PART V	THE DEFECTIVE ASPECTS OF THE LIABILITY - THE CASE FOR REFORM	5.1-5.18	33-42
	A. General anomalies	5.3-5.6	33-35
	B. Legal uncertainties and practical difficulties:	5.7-5.14	35-40
	(i) Legal uncertainties	5.7	35-36
	(ii) Practical difficulties	5.8-5.14	36-40
	C. The conveyancing trap	5.15-5.18	40-42
PART VI	OPTIONS FOR REFORM	6.1-6.27	43-62
	(A) Technical reforms	6.2-6.14	43-51
	Registration	6.3-6.9	44-49
	Observations on registration as the core of a solution	6.10-6.13	49-51
	Provisional conclusion on adoption of a registration system	6.14	51
	(B) Abolition of the liability	6.15-6.27	52-60
	(i) Immediate abolition, without compensation	6.16-6.17	52-53
	(ii) Immediate abolition, with compensation	6.18	53-54
	(iii) Abolition, without compensation, by stages	6.19-6.27	54-60
	(a) The major point - phasing-out	6.20-6.22	54-56
	(b) The subsidiary point - the periods	6.23	56-57
	(c) The interim limitation of claims to apportioned sums	6.24-6.25	57-59
	(d) Other interim measures?	6.26-6.27	59-60
	PROVISIONAL CONCLUSION	6.28	60-62

THE LAW COMMISSION

Item IX Of The First Programme

TRANSFER OF LAND
LIABILITY FOR CHANCEL REPAIRS

INTRODUCTORY NOTE

This Working Paper is unusual in that it has not been prepared by the Law Commission. Our former Secretary, Mr. Brian O'Brien, had been concerned with the topic while he was at the Commission and we asked him to prepare the Paper for publication by us. We are very grateful to him for having done so. For his own part Mr. O'Brien has asked us to record his own thanks to Mr. J.W. Cook (Official Solicitor, Church Commissioners) and Mr. G.T. Jones (Solicitor to the Representative Body of the Church in Wales) for having read the Paper in draft.

As we said in our Seventeenth Annual Report, it is now some years since our attention was drawn to the problem which arises when a purchaser of land discovers that he has a liability to pay for the repair of the chancel of the parish church. After making enquiries we originally concluded that the subject was not urgent and that we should not revert to it until we had the necessary decisions from the church authorities. More recently attention was again focussed on the problem by a particular case in which a landowner, who was unaware that there was any liability, had to pay a five-figure sum for the repair of the chancel of his parish church. Partly in consequence of this case, The Law Society asked us to take further action in the matter.

Our reason for thinking that a decision was required from the church authorities before we could sensibly make progress was as follows. For the reasons set out in the Working Paper, we did not believe that the solution to this complex problem lay either in a system of registration of the liability or in extinguishing it in return for full compensation for churches which are adversely affected. It therefore appeared that the best answer might consist of a phasing-out of the liability over a period

without compensation. Such a solution could probably only be achieved in practice with the co-operation of the churches concerned.

In the light of these considerations we decided that the first step should be to ascertain whether the Church of England (to which all affected churches in England belong) would be willing in principle to accept such a phasing-out of the liability, leading to its eventual extinction. The General Synod discussed a paper on the topic in February 1982 and a motion welcoming a proposal on these lines was carried by a very substantial majority.

We were therefore encouraged to issue the Working Paper prepared by Mr. O'Brien which comes to the provisional conclusion that liability for chancel repairs should be phased out without compensation over a period of 20 years. We do not regard this as a perfect solution. If it were possible, it would be better to abolish the liability immediately whilst ensuring that the finances of the parishes concerned were not adversely affected. This would probably mean that public money would have to be made available, and opinions may well differ as to the likelihood or desirability of the provision of public funds for this purpose. On the assumption that no public money is provided, our provisional conclusion is that the solution proposed in the Working Paper is the best available.

We should like to stress that our tentative conclusion is provisional only and is published for the purpose of consultation. We shall be very glad to receive comments on this provisional conclusion and the other matters discussed in the Working Paper. In particular we would be grateful if those who disagree with our provisional conclusion would explain whether they would deal with the problem at all, and if so how.

TRANSFER OF LAND
LIABILITY FOR CHANCEL REPAIRS

PART I
INTRODUCTION

1.1 Many people would be surprised to learn that simply because they own a particular piece of land[1] a parochial church council can call on them to repair the chancel of the parish church,[2] or at least to contribute towards such repair. Indeed, "surprised" is probably too mild a word because when they acquired their property the existence of the potential liability was probably not appreciated by the parties to that transaction or by their legal advisers, and the property was accordingly acquired on terms which excluded any right of indemnity against their precedessors in title.[3]

1.2 The liability has a long and rather complicated history without some knowledge of which it cannot be understood. We therefore make no apology for the fact that the next part of this Working Paper is given over to an account of matters which are in themselves of little more than antiquarian interest, but which serves to explain the surviving chancel repair liability, and its extent. It will, however, be convenient to say something about the extent of the liability at the outset.

1.3 By no means every parish church has the benefit of the repairing obligations with which we are concerned. The liability is historically associated with the ownership of tithes, and the tithe system was never extended to the very large number of new parishes established in relatively modern times by the subdivision of "ancient" parishes. The repair right may be enjoyed by a mediaeval church but it

---

1 This may amount to no more than a semi-detached house on a housing estate.

2 Chancel Repairs Act 1932, s.2.

3 The normal covenants for title do not cover this liability: Chivers & Sons Ltd. v. Air Ministry [1955] Ch. 585.

will not be attached to a Victorian building which is the parish church of a parish created in the last century. For this reason, the repairing obligations are more likely to exist in rural areas than in towns. We do not know exactly how many churches currently have the benefit of the right but recent researches carried out by the Church Commissioners suggest that the total number probably lies between four and six thousand: broadly, that is to say, one-third of all parish churches.

1.4 Similarly, the liability to repair the chancel has never run with the ownership of all the land now (or even formerly) within ancient parishes. As we shall see, the repairing obligations have in many cases been transferred to the parochial church councils themselves; and in other cases they fall on certain ecclesiastical and educational foundations[4] in such a way that the obligations have not become attached to land at all. Where they have become so attached, the particular lands affected may constitute a small portion only of the lands within the ancient parish in question.

1.5 Despite the limitations just indicated, the incidence of the liability is as a matter of law much more widespread than is commonly realised. That does not mean however that it is regularly enforced in practice - at any rate in those cases where the liability has become attached to land in the ownership of private individuals. The fact of the matter is that the history of the affected lands relevant for present purposes has ceased to be relevant for ordinary conveyancing purposes and (for that and other reasons[5]) it is usually very difficult now to identify the affected lands. That doubtless constitutes part of the explanation for the relative infrequency of demands by parochial church councils. It certainly accounts for the fact that the owners of the affected lands are commonly unaware of their potential liability. Somewhat paradoxically, if parishes had kept their own records more efficiently, and had made a practice of enforcing their rights with invariable strictness, one of the

---

4 Notably the Church Commissioners, Cathedral chapters and Oxford and Cambridge Colleges.

5 See in particular para. 5.8 below.

principal complaints about the liability would never have arisen. The fact that the ownership of particular land attracted the liability would then have been notorious in the locality and so would have been readily discoverable by a purchaser making normal enquiries.

1.6 The Law Commission's interest in the subject is centered on the "trap" created by the absence from the modern conveyancing system of any mechanism designed to give notice of the existence of chancel repair liability where that liability is attached to the ownership of the land being conveyed. We are much less concerned to debate the merits of the liability itself, as a method of financing church repairs; but if this Paper contains any general message it is, we think, that the liability now gives the impression of being arbitrary in its incidence and that its usefulness in practice is largely a matter of luck. However, as will appear later in this Paper, our examination of the question to date has led us to the view that a purely technical solution of the "trap" problem, taken in isolation, would create practical difficulties of considerable severity, and that the adoption of such a solution would almost certainly be unwelcome to parishes and to affected landowners alike. It has therefore appeared to us that the search for a solution will of necessity involve trespassing into the wider area, the existence of the liability itself.

1.7 In pursuing this line we have worked closely with the officers of the Church Commissioners and of the General Synod of the Church of England. In order to enable the reactions of the General Synod to be obtained, Synod had before it at its February Sessions 1982 a Report from its own Standing Committee and a Memorandum which was in effect a very short version of the present Working Paper. In a debate which took place on 18 February a number of options were well ventilated and at the conclusion there was overwhelming support for the motion, moved on behalf of the Standing Committee, welcoming the gradual phasing out of chancel repair liability, and its eventual extinction. That (if we may anticipate) is the preferred solution suggested in this Paper. We have not taken similar preliminary soundings in Wales, but we hope that the Church in Wales, speaking as a whole, would express a substantially similar view.

PART II

HISTORY OF THE LIABILITY

Background

2.1 The chancel repair liability with which we are concerned has existed at common law from "the time whereof the memory of man runneth not to the contrary", that is to say from before the accession of King Richard I in 1189. We have to start by putting the topic into its early context, which is that of parochial finance in mediaeval times.

2.2 At the time of which we speak, every parish had its parish priest, known in law as the "rector". His income was derived from sources within the parish, principally (i) the profits of the glebe, which was land belonging to him in right of his office; and (ii) the tithes. The latter gave the rector one-tenth of the produce of or from the land in the parish and originally came to him in kind, be it in the form of crops, stock or dairy products. By the end of the mediaeval period however the tithes had been widely commuted by local custom into fixed money payments. The rector's proprietary rights, taken together, constituted the "rectory".[1]

2.3 The glebe and tithes provided for the maintenance of the rector. In addition, provision had to be made for the maintenance of the parish church. The general rule in Western Europe, under Canon Law, was that the repair of the church was the personal responsibility of the parish priest; but by the custom of England the responsibility was, in general, divided between the rector and the parishioners.[2] The latter

---

1 Today the word, in ordinary use, is restricted in its meaning to the parsonage house of an incumbent, if he is called "Rector". In the present Paper we will however use the word in its older and wider sense.

2 Pense v. Prouse (1695) 1 Ld. Raym. 59, Holt C.J. In some places, notably the City of London, the whole responsibility was by local custom assumed by the parishioners: ibid.; and see Bishop of Ely v. Gibbons and Goody (1833) 4 Hag. Ecc. 156 in which a similar custom was established by evidence for the parish of Clare in Suffolk.

were liable to maintain the fabric of the western end of the church (where they sat) and the rector was left with the responsibility for the chancel at the east end of the church. In early times this part of the church was commonly separated from the rest by a rood-screen, a feature which generally disappeared at or after the Reformation. The entrance to the chancel is today likely to be marked by a step, and an arch. The parish priest, the rector, paid for repairs to the chancel out of the profits of his rectory.

2.4 Having indicated the starting point, we have to explain how the liability to repair the chancel devolved from the parish priest to the persons (and institutions) who now have the liability, and in particular how, in many cases, it falls on private landowners. But before turning to that directly it is necessary to say something about the manner of making appointments to rectories.

Advowsons

2.5 The right of appointment to a rectory, known in law as an advowson, was generally in lay hands, being vested in the successor in title to the landowner who originally built and endowed the parish church. In many, perhaps most, cases the owner of the advowson (or, as he is more usually called, the patron of the living) was at first the lord of the manor, and the advowson formed one of the rights of the manor and passed with it. Whether that was so or not, the advowson was separately transferable by conveyance.[3]

Monastic rectors

2.6 During the 13th, 14th and 15th centuries many advowsons were acquired from lay patrons by religious houses.[4] The reason for the

---

3 An advowson formerly had a value in direct proportion to the value of the related rectory, and transfers by way of sale were not uncommon. Very few (if any) advowsons may now lawfully be disposed of by way of sale in the light (in particular) of the Benefices Act 1898 (Amendment) Measure 1923, s.6.

4 Usually in consideration of an undertaking to say Masses in perpetuity for the souls of members of the transferor's family.

monasteries' interest is easily discovered. Advowsons could, of course, be exercised in favour of ecclesiastical persons only; but monasteries qualified, notwithstanding their corporate nature. As soon as the relevant living fell vacant the monastery could exercise its rights by appropriating the rectory to itself, and it invariably did so in order to obtain the profits of the rectory (especially the tithes). The advowson thereafter went effectively into abeyance, because the rector would not obtain preferment, resign or die.

2.7 Having thus made itself the rector, the monastery became responsible for the cure of souls in the parish. It fulfilled that obligation by deputy - hence the emergence of 'vicars' on the parochial scene. The monastery provided for the vicar by allotting to him a portion of the glebe and tithes. The tithes had traditionally been classified as "greater" (hay, corn and wood) and "lesser" (the remainder); and by and large the monastic rector retained the greater tithes which could be conveniently stored in barns to await collection, and assigned the lesser (and more perishable) tithes to the vicar. A further consequence for the monastery in making itself the rector was that it became, as rector, liable for chancel repairs. The principal mark of that liability was receipt of the rectorial tithes.

Laicization of monastic rectories

2.8 The general dissolution of the religious houses during the reign of King Henry VIII marks the next stage in the history of the topic. In some cases the former abbeys became the cathedral churches of new dioceses, effectively retaining their former property by way of endowment. To the extent that that property included rectories it included also chancel repair liabilities. In some further cases monastic property was transferred to existing cathedrals by way of additional endowment: a particular transfer of this sort from Westminster Abbey[5] to St. Paul's, in London, is believed to be the origin of the expression "robbing Peter to pay Paul". Again, if the property included a rectory, the transfer of the benefits carried with it the repair burden. But in the majority of cases the property of the religious houses - including their

5 The Abbey Church of St. Peter.

advowsons and the rectories which they had appropriated thereby - were disposed of by the Crown in favour of lay institutions (notably Oxford and Cambridge Colleges) and individuals.[6] It was as a result of those impropriations that entitlement to rectorial tithes and glebe fell into collegiate and private hands. The new lay rectors, as rectors, inherited the chancel repair liabilities.[7]

2.9 We pause there in our outline of the history in order to emphasise the words "as rectors" in the previous sentence. On the disposal of monastic property the destination of an advowson and of its connected rectory was generally the same, so that the new patron and the new (lay) rector were one and the same person.[8] (The advowson, which had lain dormant while in monastic hands, revived: not for the original purpose of making presentations to the rectory, but for the purpose of appointing the vicar of the parish, who now held the cure of souls in his own right and not merely as a deputy.) Now the common identity of the patron and the lay rector has given rise to a misunderstanding. It is widely believed that the patron is liable to repair the chancel. That belief has perhaps been encouraged by the fact that tithes have disappeared while rights of patronage and chancel repair liabilities have not. It will however be clear from what we have already said that the chancel repair liability was always attached to the ownership of the rectory, and not to the right to appoint to the rectory, (or, in more recent times, vicarage). The chancel repair liability follows the history of the rectorial property, because the owner of what is at any point of time rectorial property is the rector (or at least a rector). Rectorial property includes rectorial glebe, but for present purposes it is the rectorial tithes which really matter. The patron (as such) is not concerned in that history.

---

6 The Suppression of Religious Houses Act 1539 (31 Hen 8. c.13) confirmed the King's grants thus authorising rectories to be held as lay fees.

7 Serjeant Davies' Case (1621) 2 Rolle 211.

8 Sometimes the rectorial property was divided between two or more grantees, so the parish acquired two or more rectors. But even in such a case the advowson would normally have gone to one of the new rectors.

Tithes

2.10 We have now to turn our attention to tithes, with particular reference to those payable to the rector. Although these remained valuable assets they were to a large extent not receivable by the Church at all, let alone by the parochial clergy for whose benefit the right was originally established. Furthermore, the value of those tithes which had been commuted by custom into fixed money liabilities suffered from the marked fall in the value of money which took place during the 16th century.[9] Increasingly, tithes were regarded as a nuisance; and from the later years of the 17th century steps were taken, at intervals, to eliminate them. The process has only recently been completed.

2.11 The first available opportunity for dealing with the tithes in a parish usually arose in connection with the enclosure of the parochial common lands. At one time, every village had an area of land enjoyed by the villagers in common for pasturing, wood-gathering and so forth. From the end of the 17th century onwards, there was an increasing tendency for these lands to be "enclosed", that is to say to be appropriated to particular owners and fenced off. The process was for the most part carried out under the authority of Acts of Parliament,[10] supplemented by local Enclosure Awards. In making an award, it was possible to appropriate part of the common land to the rector as such,[11] to the intent that the land so appropriated should stand in place of the rectorial tithes. The villagers' shares in the former common lands were diminished by that appropriation, but their lands were thenceforth freed from those tithes.[12] The rector's new land became rectorial property instead of his

---

9 The importation into Europe of quantities of gold and silver from newly-discovered America made possible (and in fact resulted in) a considerable increase in the money supply: with inflationary consequences.

10 Usually Local Acts, of which there are believed to have been some 2230 (see Millard's Tithes, p.12).

11 In addition, of course, to land to which he might be entitled as an ordinary landowner, or lord of the manor.

12 The vicarial tithes would, by the same process, have been eliminated, so that the tithes disappeared altogether.

tithes, and chancel repair liability accordingly became attached to the ownership of that land.

2.12 The effect of an enclosure award made in the circumstances just described is clearly demonstrated by one of the very few relatively recent cases about chancel repair liability: Chivers & Sons Ltd. v. Air Ministry.[13] In that case it was shown that Queens' College, Cambridge had, in 1834, been allotted certain lands as lay rector of the parish of Oakington in Cambridgeshire, in lieu of rectorial property including tithes. Part of those lands was sold to Chivers Ltd. in 1924 and another part was sold to the Air Ministry in 1940. In 1950 the chancel of Oakington parish church required repair; and the upshot of the case was that the company and the Ministry had, by acquiring relevant rectorial property, made themselves lay rectors and were accordingly both liable to defray the cost.[14]

2.13 An important step was taken in relation to tithes in 1836 when the Tithe Act of that year introduced procedures for converting existing tithes into money liabilities ("tithe rentcharges") charged on the lands in respect of which tithes had been payable.[15] With a few insignificant exceptions which we can disregard for present purposes, tithes were within a few years so converted, either by agreements reached in parochial meetings or by awards made by the Commissioners appointed to execute the Act. This Act contained two provisions of particular relevance to the history of the chancel repair liability. First, where the rectory was still in the hands of an ecclesiastical owner, land could be given to the rector instead of tithe rentcharges.[16] Where that

---

13 [1955] Ch. 585.

14 As the name of the case indicates, the proceedings were, in form, an application by Chivers & Sons Ltd. for a contribution from the Ministry.

15 The liabilities were variable by reference to the price of corn. Certain other rents quantified on the same basis and known as "corn rents" were rents similar to tithe rentcharges which arose under pre-1836 commutations. Tithe rentcharges were stabilised by the Tithe Act 1925, s.l.

16 Tithe Act 1836, ss. 29 and 62; extended by Tithe Act 1839, s.19.

option was taken up, the effect was the same as that of an award to the rector under an enclosure scheme: the land became rectorial property and chancel repair liability thenceforth attached to its ownership. Secondly, provision was made for the extinction of the right to tithes by merger in the land out of which the rentcharge issued.[17] There was not to be merger by operation of law, but the tithe rentcharge owner could effect a merger specifically by deed.[18] On such a merger obligations previously attached to the tithes or tithe rentcharge (including, it is generally thought, the chancel repair liability), were transferred to the freehold interest in the land in which the rentcharge had merged.[19]

2.14 A number of Acts relating to tithes and tithe rentcharges were passed during the succeeding hundred years until, by the Tithe Act 1936, tithe rentcharges were abolished and were replaced (from the payers' standpoint) by "tithe redemption annuities". These were terminable charges due to expire in 1996. In fact they were terminated prematurely in 1977.[20]

2.15 The tithe redemption annuities were payable to the Government[21] and Government stock was issued to most of the owners in actual receipt of rentcharges, by way of compensation for the extinction of their rights. By contrast with earlier legislation in this field, the 1936

---

17 Tithe Act 1836, s.71; and see also Tithe Act 1839. Unity of possession did not produce merger at common law: Chapman v. Gatcombe (1836) 2 Bing. N.C. 516. Even if the tithes and the land in respect of which they were payable were owned by the same person they were owned in different capacities. In such a case payment of the tithes was simply in abeyance, pending severance of the titles.

18 The declaration would usually be in favour of the rentcharge owner's own land; but he could dispose of the rentcharge to the owner of the burdened land to the intent that it should merge.

19 Tithe Act 1839, s.1.

20 Finance Act 1977, s.56.

21 Originally collected by the Tithe Redemption Office, but latterly by the Board of Inland Revenue.

Act dealt specifically, in its Seventh Schedule, with the question of chancel repairs. It has however to be emphasised that the Act was concerned only with tithe rentcharges and accordingly with the chancel repair liabilities connected with them alone.

2.16 The effect of the 1936 Act, with particular reference to the repair liabilities, may be summarised as follows. Tithe rentcharges were divided into four classes:[22]

Class (a): Rentcharges receivable by persons other than those within Class (b). These rentcharges were extinguished and compensation stock was issued. Part of the stock was issued to the rentcharge owners and part was issued to the appropriate Diocesan authority on behalf of the parochial church council to which the chancel repair liability was transferred.

Class (b): Rentcharges receivable by spiritual rectors[23] and certain ecclesiastical[24] and educational[25] foundations. These rentcharges were extinguished and compensation stock was issued in full in respect of them. The chancel repair liability remained where it was. (Where the tithe rentcharge had been paid to a spiritual rector in right of his benefice the stock was issued to Queen Anne's Bounty and the benefice was augmented appropriately. The rector's chancel repair liability had, in most cases, already passed to the parochial church council[26]).

---

22 Tithe Act 1936, Sch. 7., para. 2.

23 I.e. rectors in the original sense, the parsons of parishes whose rectories had never become subject to lay impropriation.

24 The Church Commissioners (as successors to Queen Anne's Bounty and the Ecclesiastical Commissioners) and ecclesiastical corporations such as Deans and Chapters.

25 Oxford, Cambridge and Durham Universities; their constituent Colleges; Winchester and Eton.

26 Ecclesiastical Dilapidations Measure 1923, s.52(1).

Class (c): Rentcharges which were not currently payable because they and the lands out of which they were payable were owned by the same persons. The 1936 Act (unlike the 1836 Act) merged the rentcharge in the land in such a case and the rentcharge was thus extinguished. No stock was issued, the land formerly charged being discharged by the merger. But (as under the express mergers effected under the earlier legislation[27]) the exonerated land became land to which chancel repair liability attached.

Class (d): Rentcharges which had already merged under the 1836 and subsequent Acts. These, of course, did not require extinction in 1936, and no compensation was called for. They were introduced into the 1936 Act in order to add them back to the sum of the original tithe rentcharges, so that the lands in which they had merged should bear their proper part in the apportionment of the chancel repair liability flowing from the tithe rentcharge source.

2.17 The Commission appointed to put the 1936 Act into effect was required to compile, in relation to every chancel repairable by tithe rentcharge owners, a document which has come to be known as the Record of Ascertainments. The information recorded, and the way in which the chancel repair liability was apportioned, may be illustrated from the actual Record relating to a particular parish.

Parish X

Total tithe rentcharges in 1844:

Vicar	£190.10.0
All Souls College, Oxford	21. 0.0
Lay Impropriator A	5. 0.0
Lay Impropriator B	22. 0.0
Lay Impropriator C	15. 0.0
Lay Impropriator D	7.10.0
Lay Impropriator E	24. 0.0
	£285. 0.0

27 Para. 2.13 above.

Apportionable amount: £76.5.0. (The Vicar's rentcharges derived from vicarial tithe and did not carry chancel repair liability. It seems that £18.5.0 of the College's rentcharges were either derived from a non-rectorial source or, more likely, had been redeemed).

Class (a)	rentcharges	£ 5. 0.0	(evidently representing that of Lay Impropriator A)
Class (b)		2.15.0	(College's balance)
Class (c)		22. 0.0	(evidently representing that of Lay Impropriator B)
Class (d)		46.10.0	(evidently representing those of Lay Impropriators C, D and E)
		£76. 5.0	

In the result, in that parish the Diocesan authority would have become responsible for 1200/18300ths of the chancel repair liability, in the place of the owners of the Class (a) rentcharges; All Souls College (a Class (b) rentcharge owner) became liable for 660/18300ths; and the various owners of the lands in which rentcharges had merged (the Class (c) and Class (d) rentowners) became liable for 16440/18300ths between them. The lands in which rentcharges had merged were identified in Schedules to the Record, by reference to a plan.

Glebe

2.18 Rectorial tithes form much the more important source of chancel repair liability and we can provide a much shorter outline of the relevant history of glebe, the other form of rectorial property from which the liability may flow.

2.19 Glebe is defined as land forming part of the endowment of a benefice (that is, a rectory, or vicarage with cure of souls), other than the parsonage house and its grounds. For present purposes it is necessary to distinguish between:-

(a) Mediaeval glebe which fell into monastic hands with the rectory, and subsequently passed to a lay impropriator;

(b) Mediaeval glebe which fell into monastic hands with the rectory and was then allotted to the vicar;

(c) Glebe forming (until very recently) part of a rectory which was never appropriated by a religious house, and so has always been a spiritual rectory; and

(d) Land which was glebe within (c), but which has been disposed of.

2.20 The first (which we may call "impropriated glebe") ceased on impropriation to be glebe as defined. There is no doubt that its ownership carries chancel repair liability with it. We may add that the chances of a piece of land being identifiable today as impropriated glebe are fairly remote, unless it is still in the hands of the original lay impropriator (such as an Oxford College), and the details of its acquisition are known. We are not aware of any litigated case in which liability to chancel repairs has been based directly on the ownership of impropriated glebe,[28] but there may well be instances of acceptance of liability wholly or partly on that basis.

2.21 The second, vicarial glebe, does not concern us because, like vicarial tithe, it is not rectorial property and therefore does not carry chancel repair liability.

2.22 The position in relation to the third, true rectorial glebe,[29] seems to be equally clear. Up to 1923 the spiritual rector was liable to repair the chancel,[30] but that liability was then in almost every case

---

28 But it appears from the statement of facts in Chivers & Sons Ltd. v. Air Ministry [1955] Ch. 585 that the original rectorial property replaced by the lands in question in the case had included former glebe.

29 This was often more extensive than the mediaeval glebe, having been added to by e.g. allotments in lieu of tithe or tithe rentcharges (see paras. 2.11 and 2.13 above), gifts and purchases. Statutory authority was often necessary for the latter because of mortmain (see e.g. Gifts for Churches Acts 1803 and 1811).

30 The Pluralities Act 1838 s. 92 showed that this was so even if a stipend equal to the whole of the endowment income of a rectory was allotted to a curate.

transferred to the parochial church council by the Ecclesiastical Dilapidations Measure 1923.[31] There has in fact been no true rectorial glebe since 1 April 1979 because there came into force on that day certain provisions[32] of the Endowments and Glebe Measure 1976 (a measure designed to eliminate the gross inequalities between parochial endowments) whereby all glebe belonging to individual benefices vested in the appropriate Diocesan Board of Finance for the general benefit of the Diocesan stipends fund.

2.23 The position of the fourth, former glebe land acquired from a spiritual rector, is perhaps not so clear, but the better view in principle is, we think, that such an acquisition does not carry with it any chancel repair liability. The question at the root of the matter is, does a disposition of rectorial property constitute also a disposition (in whole or in part) of the rectory itself, or is it an alienation of the property from the rectory? Not surprisingly, purchasers of land from lay impropriators have contended for the second alternative - in the Chivers case, the Air Ministry argued that Queen's College alone was still the rector, and as such solely responsible for the chancel repairs - but the contention has not found favour in the courts.[33] Lay impropriators have always been free to dispose of their rectorial property and are under no obligation to preserve the proceeds of sale (if any) by way of security for the continued performance of rectorial obligations; and the courts have taken the view that in those circumstances the rectory (or an appropriate share of it), together with its obligations, should pass with the property. But the same considerations do not apply to dispositions by spiritual rectors. Freehold dispositions of rectorial property by such rectors were prohibited

---

31 Sect. 52(1). By s.39 of the Endowments and Glebe Measure 1976, chancel repair liabilities of the Church Commissioners arising out of glebe or tithe rentcharges held or formerly held by the Commissioners on trusts for particular benefices were similarly transferred to the relevant parochial church councils.

32 Particularly s.15.

33 Chivers & Sons Ltd. v. Air Ministry [1955] Ch. 585; Hauxton P.C.C. v. Stevens [1929] P.240; and see In re The Alms Corn Charity [1901] 2 Ch. 750.

by the Ecclesiastical Leases Act 1571, and even leasing was severely restricted. It was not until a much later date that glebe could be sold or exchanged at all,[34] and a general power (hedged around nevertheless with requirements of non-objection and approval) seems not to have existed before the Ecclesiastical Leasing Act 1858. But the proceeds of sale had always to be added to the endowments of the benefice. In those circumstances there is no special reason for construing a conveyance of glebe land under the statutory powers as including a part-disposal of the rectory itself. Indeed, the proposition that by selling part of the glebe the spiritual rector makes a layman[35] co-rector with himself is, in our view, an unpromising one. That is why we think that dispositions by spiritual (as contrasted with lay) rectors sever the property disposed of from the rectory and from its attendant obligations. That is the explanation, we believe, for the undoubted fact that rectorial property allotted by monastic spiritual rectors to their vicars never attracted chancel repair liability. We would only add, by way of parenthesis, that on any view the liability can hardly attach to glebe land disposed of since 1923 if at the time of the disposal the repair of the chancel had already ceased to be a responsibility of the rectory.

Corn rents, etc.

2.24 We now enter shortly upon a subject of some obscurity. We have already[36] explained how, under Inclosure Acts, land sometimes took the place of rights to tithes. That was, however, not the only thing that could happen to tithes under the Acts. It is thought that in perhaps a quarter of the many Inclosure Acts some or all of the tithe liabilities in the parish were converted into rentcharges variable with the price of corn from time to time, which were accordingly known as "corn rents". These provisions anticipated the general conversion of tithes into tithe rentcharges by the Tithe Act 1836. It is known, moreover, that similar rentcharges were created in lieu of tithe liabilities under other local Acts, and not in connexion with an enclosure scheme.

---

34 The Clergy Residences Repair Act 1776, s.11 is the earliest instance to have come to our notice.

35 Or perhaps a limited company!

36 Para. 2.11 above.

2.25 The Tithe Act 1936 was primarily concerned only with 1836 Act tithe rentcharges and it did not extinguish the earlier tithe corn rents or rentcharges. Nor did it have anything to say about the chancel repair liability connected with such payments. There can be no doubt that such liability does run with such of those payments as represent rectorial tithe: their position is indistinguishable in principle from land representing rectorial tithes. The extent of chancel repair liability under this head is not known; but the overwhelming majority of the corn rents etc. collected by the Church Commissioners appear to represent vicarial rather than rectorial tithes, and it may be fair to infer that commutations of tithes belonging to lay rectors usually took a landed rather than a money form.

Redeemed tithe rentcharges, corn rents, etc: and the Limitation Act

2.26 Several of the Tithe Acts[37] contained provisions for the redemption of tithe rentcharges, and these were in 1885 extended to corn rents etc.[38] So far as the latter were concerned, the provisions were essentially preserved by the Tithe Act 1936.[39] If and when the Commissioners of Inland Revenue make a scheme for the purpose, the provisions will be replaced by such scheme.[40]

2.27 We are not concerned in this Paper with the question whether these rents are now payable or not, but we are required at least to ask the question, what happened to the attendant chancel repair liability when the relevant rectorial property ceased on redemption to exist? The statutes appear to be silent on this question.[41] There appear to be three possible answers:

---

37 E.g. Tithe Acts 1846, 1860 and 1878.

38 Tithe Rentcharge Redemption Act 1885. The corn rent could be redeemed outright or by way of an enlarged, terminable, rentcharge known as a "corn rent annuity".

39 Sect. 30(1).

40 Corn Rents Act 1963.

41 It is not thought that chancel repair liability is an "incumbrance" within Tithe Act 1860, s.36.

(i) Quoad the redeemed rentcharge, the chancel repair liability disappeared. This is not perhaps an unreasonable answer if the redemption affects an insignificant proportion of the whole of the liability - bearing rentcharges; but there are obvious difficulties about it if that is not so. It is known that in some parishes the entirety of the tithes were redeemed in the 19th century,[42] and that answer might therefore mean that the repair of the chancel became wholly unprovided for. It will be recalled that the parishioners' customary liability is a limited one: it is not as though the parishioners are responsible for the fabric of the whole of the church except so far as the rector is, by custom, liable.

(ii) The liability was transferred to the land out of which the rentcharge (or corn rent) had been payable: on the footing that the redemption should be treated as a purchase of the rentcharge (or corn rent) by the landowner which brought about a merger.

(iii) The liability remained with the former rent owner, treating the redemption moneys as the substituted rectorial property.

We do not think that the first answer can, in principle be right,[43] but the choice between the second and third is not an easy one. Bearing in mind

---

42 This appears from County lists published in Grove's Alienated Tithes (1876).

43 Notwithstanding the suggestion to the contrary in the Board of Inland Revenue's Explanatory Notes on Liability for Chancel Repairs (1971). It is perfectly true that the apportionment scheme set out in Part I of the 7th Sch. to the Tithe Act 1936 does not add back redeemed tithe rentcharges in the same way as it adds back merged rentcharges, with the result that redeemed rentcharges do not figure in the Record of Ascertainments; but we believe this was not because the repair liability had ceased but because the third answer to the question posed in the text above was regarded as correct and the apportionment scheme did not fit liabilities not attached to land.

the evident reluctance of the Courts to hold that lay impropriators who have disposed of the relevant rectorial property (and do not have to preserve the proceeds) remain rectors, the second answer would appear appropriate. On the other hand a Committee on Chancel Repairs[44] adopted the third answer in 1930; and the general scheme of the Tithe Act 1936 (which can be regarded as a wholesale redemption) appears to be consistent with that view. That Act is, however, a somewhat uncertain guide in the present context. It was clearly seen that if compensation stock were issued to lay impropriators (other than the excepted ecclesiastical and educational corporations) it would become impossible to trace the responsible lay rectors thereafter: hence the provision for (in effect) compulsory commutation of the chancel repair liability.[45] Precisely the same considerations apply to redeemed rents, but no similar provision was attached to them. Perhaps it was thought to be too late to do anything about redeemed rents, and that if persons liable for chancel repairs had become untraceable that was a misfortune past praying for. All that can be said for certain about chancel repair liability in connection with redeemed rents is that the position is uncertain.

---

44 Report of the Chancel Repairs Committee (1930, Cmd. 3571). "Other tithe rentcharges have been extinguished by redemption, in which case the burdens on the tithe rentcharges have not become burdens on the lands out of which the tithe rentcharges formerly issued, but are burdens on the capital sum or annuity representing the consideration for the redemption of the tithe rentcharges".

45 See para. 2.16 above - the provision applicable to Class (a) rentcharges whereby part of the stock was issued not to the tithe rentcharge owner but to the diocesan authority. That the reason for this provision was as stated in the text is shown by the reasons for an amendment made in Committee in the House of Lords to ensure that tithe rentcharges belonging to the very few sinecure spiritual rectors would be Class (a) rather than Class (b): Hansard (H.L.) (1935-36) Vol. 101, Cols. 950, 951.

2.28 Tithe rentcharges, corn rents etc. are all rights to which the provisions of the Limitation Act 1980 relating to land apply. Having regard to the fact that the amounts charged were often small we think it likely that non-payment has in numerous cases led to the extinction of the rights themselves, under the statute. All the doubts which we have expressed in the preceding paragraphs as to the effect on attendant chancel repair liability of extinction of the rights by redemption are, it seems to us, equally expressible in relation to cases where the rights are extinguished by the operation of the Limitation Act.

Summary

2.29 In the light of that historical outline we are now in a position to indicate in summary form who (apart from parochial church councils) are or may be liable to repair the chancels of parish churches.

First, the Church Commissioners; ecclesiastical corporations such as Deans and Chapters of Cathedrals; Oxford, Cambridge and Durham Universities and their constituent Colleges; Winchester College; and Eton College.

Members of this select group may be liable simply by virtue of having owned relevant tithe rentcharges immediately before the extinction of such charges by the Tithe Act 1936.[46] They may also be liable as landowners under any of the following heads.

Second, landowners whose land was once included in an award under an Inclosure Act to a lay tithe owner in lieu of tithe.[47]

Third, landowners in whose land the right to tithes or tithe rentcharge has merged, either under the Tithe Act 1936 or under an earlier Tithe Act.[48]

---

46 Para. 2.16 above, Class (b).

47 Para. 2.11 above.

48 Para. 2.16 above, Classes (c) and (d).

Fourth, landowners whose land was originally part of the glebe of a parish but fell into lay hands on the distribution of monastic property.[49]

Fifth, persons and bodies entitled to corn rents (and other payments) in lieu of rectorial tithes.[50]

In addition we think that the liability probably arises in connection with tithe rentcharges, corn rents and other rents in lieu of tithes which have themselves disappeared by redemption[51] or under the Limitation Statutes[52] though we are unable to say on whom such liability falls. And it may also arise (though we think not) in connection with the ownership of glebe land acquired from spiritual rectors.[53]

2.30 We have been told by the Church Commissioners that they themselves are, under one head or another, solely or partly liable for the repair of some 800 chancels; that Cathedral authorities have liabilities in respect of some 200; and that educational foundations have liabilities in respect of a further 200. The number of chancels repairable by other landowners may therefore be of the order of 4000. Since most lay rectories appear to have become fragmented over the years (especially as the result of the division and separate disposals of land representing rectorial tithes) the total number of individuals upon whom the liability rests, at least in theory, must be considerable.

---

49 Para. 2.20 above.

50 Para. 2.25 above.

51 Para. 2.27 above.

52 Para. 2.28 above.

53 Para. 2.23 above.

PART III

FEATURES OF THE LIABILITY AS THE LAW NOW STANDS

3.1 One aspect of the law on chancel repairs - the identity of the person or body liable - has been dealt with already, because the present position is inexplicable except by reference to the history of the subject. We attempted a summary in para. 2.29 above. In this Part we propose to cover other aspects of the liability as it now exists, with particular reference to those points which call for discussion. We will also deal shortly with the manner in which the liability is enforced and the existing provision enabling a liable person to buy his freedom from it.

The meaning of "repair" in this context

3.2 It is, we believe, accepted that the rector's duty is to maintain the fabric of the chancel in its existing form. He is not obliged to effect enlargements or improvements; but if the chancel is enlarged or improved, then it is generally accepted that he will be required to maintain it as so enlarged or improved. Nor is he responsible for mere ornamentation or decoration.[1] There are, however, statutory indications that the liability extends beyond what might commonly be regarded as "repair", to encompass reinstatement in the event of the chancel suffering severe damage or being destroyed. First, the provision enabling the liability to be compounded calls for a payment of "a capital sum the income of which will be sufficient to insure the chancel for a sum adequate to reinstate the same in the event of its being destroyed by fire";[2] and the provision in the Tithe Act 1936 under which part of the compensation stock was in many cases[3] issued to the Diocesan authority rather than to the tithe rentcharge owner[4] is to the same effect. Secondly, the War Damage Act 1943 expressly negatived the rector's liability to make good war damage.[5]

---

1 For most of these propositions, see Wise v. Metcalfe (1829) 10 B. & C. 299 at p. 316.

2 Ecclesiastical Dilapidations Measure 1923, s.52(2) as added to by the Ecclesiastical Dilapidations (Amendment) Measure 1929, s.18.

3 Para. 2.16 above, Class (a) cases.

4 Tithe Act 1936, s.31(2).

5 War Damage Act 1943, s.119.

Personal liability: and its consequences

3.3 As we have shown in our historical Part, the repair of the chancel was a personal responsibility of the rector, and it remains so. It is easy, but misleading, to think of the liability as something directly attached to the rectorial property, especially if that property (as a result of substitution or otherwise) takes the form of land. The true position is that the acquisition of the rectorial property will usually be treated as the acquisition of the rectory (or of a share in it) as well, thus giving the acquirer the status of rector; and because he is rector he is liable. Certain important consequences flow from this analysis.

3.4 First, the liability is not an encumbrance on the rectorial property in the same sense as is, for example, a mortgage or charge.[6/7] A purchaser of land constituting rectorial property will be liable even if he had no notice whatever of the liability's existence;[8] and he does not have the benefit of the implied indemnity covenant contained in Part I of the Second Schedule to the Law of Property Act 1925.[9]

3.5 Secondly, the liability is not limited to the value of the rectorial property. Text-book writers on the subject were inclined to state the contrary view, but the proposition is now generally accepted following the decision of the Court of Appeal in Wickhambrook Parochial Church Council v. Croxford.[10] The question is not one which was likely, in early

---

6 The liability may be a matter "subsisting in reference to "land even if it is not an ordinary encumbrance on it; and as such it constitutes an "overriding interest" in relation to registered land: Land Registration Act 1925, s.70(1)(c).

7 The parochial church council has no direct right of resort to the land if the rector defaults.

8 Hauxton P.C.C. v. Stevens [1929] P.240.

9 Chivers & Sons Ltd. v. Air Ministry [1955] Ch. 585.

10 [1935] 2 K.B. 417. The decision has been criticised (see 51 L.Q.R. 583) and it received a not altogether favourable mention in Viscount Simon's speech in Representative Body of the Church in Wales v. Tithe Redemption Commission and others [1944] A.C. 228; but it is unlikely now to be reversed.

times, to arise on the facts[11] but any limitation on the liability puts the chancel at risk and it is hardly conceivable that a monastic rector, for example, would have been allowed to plead insufficiency in the rectorial tithes as a defence. The unlimited nature of the liability is nowadays a significant matter: we have heard of a case in which the parochial church council's claim amounted to £10,000.

The liability is, in principle, several in nature

3.6 Originally, as we have seen, there was only one rector; and sometimes the entirety of the rectory passed into the hands of a single individual or body on the distribution of monastic property. In such cases the rector was liable for the whole of the chancel repair. But, as we have also seen, the rectory was often fragmented after the Reformation and in such cases each rector became liable for the whole (subject to rights of contribution from his co-rectors). That is the position at common law and it still governs the liability of lay rectors whose status as such derives from rectorial property other than tithe rentcharges created by the Tithe Act 1836. Chivers & Sons Ltd. v. Air Ministry[12] affords a clear illustration of the principle at work.

3.7 The Tithe Act 1936 effected an important change in respect of the chancel repair liabilities associated with the ownership (or former ownership) of the four classes of tithe rentcharge listed in paragraph 2.16 above. Those chancel repair liabilities were thereafter apportioned at law[13] and a parochial church council is able to recover from a particular person only the due proportion of the repair costs shown for that person in the Record of Ascertainments. Reverting to the example given in paragraph 2.17 above, the parish church council could recover from All Souls College, in respect of repair costs of £1000, a sum of £36.07 but no more. The 1936 apportionment scheme is, however, subject to certain limitations. First, there are no arrangements for sub-apportionment, so

---

11 Even in 1926 a sum of about £30 was all that was required by the Hauxton P.C.C. whose chancel was described as being "in serious need of repair".

12 [1955] Ch. 585.

13 Tithe Act 1936, Sch.7.

that if land in respect of which a particular fraction of the liability is apportioned has been sub-divided, each of the owners of the sub-divided area will be severally liable for the whole of the apportioned fraction (with a right to claim contributions from the others). Secondly, only the four classes listed in paragraph 2.16 are within the scheme. If we are correct in believing that there are (at least in theory) outstanding chancel repair liabilities associated with tithe rentcharges which have been redeemed[14] those liabilities extend to the whole cost[15] in accordance with common law principles.

The meaning of "owner" in this context

3.8 We have spoken of land owners being liable for chancel repairs and the question arises as to who are "owners" for this purpose. Rectorial property, including tithe and tithe rentcharge, was a common subject of grants for life, lives or terms of years.[16] Is a tenant an "owner"?

3.9 Although we are not aware of any direct authority on this question, it is our belief that at common law the liability falls on the freehold owner alone. We base that belief on the proposition that although the rectorial property might be let, the rectory was not a subject which lent itself to leasing. A tenant would accordingly not become a lay rector simply by virtue of his tenancy.

3.10 It is not at all clear to us whether the common law position has been modified by statute; or, if it has, how far. The Tithe Act 1836 contained an extended definition[17] of "owners of lands" and "owner of

---

14 Or which have been extinguished under the Limitation Act.

15 Subject, of course, to rights of contribution.

16 Bodies like Cathedral Chapters would not be in a position to farm land themselves; and they might find it convenient (and even more seemly) to dispose of tithe rentcharges on leasehold terms instead of employing rent collectors.

17 Tithe Act 1836, s.12.

tithes" for the purposes of that Act[18] but that Act had nothing to say about chancel repair liability beyond indicating (without mentioning the liability specifically) that tithe rentcharges created under the Act should succeed to the liability previously associated with the ownership of tithes which they replaced.[19] It is accordingly not thought that the 1836 Act extended the range of persons liable for chancel repairs. The Tithe Act 1936, however, does purport to deal with associated chancel repair liabilities, and it appears to be at least arguable that the references to "ownership" and "owner" in the relevant section 31 are to be read in the light of the definition of "owner of land"[20] contained in section 17. Under that definition a tenant under a lease for more than fourteen years at (broadly) a rent less than two-thirds of the clear annual value is to be treated as the "owner"[21] (the freeholder being the owner in every other case). On the other hand, section 17's extension of the meaning of ownership may not apply to the chancel repair provisions in section 31 at all. Section 31(4) speaks of the owner of the land being "subject to liability to repair in like manner as if this Act had not passed", and if it be correct that tenants were never liable before 1936 it seems arguable that section 17 did not operate to make some tenants liable after 1936.

3.11 Whatever may be the true position as regards liabilities associated with lands formerly subject to Class (c) or (d) rentcharges, we are satisfied that there has been no statutory modification of the common law in any other case. The fact remains that some tenants in some cases

---

18 In particular for the purposes of the quorums required to call a parochial meeting and to make an agreement for the commutation of parochial tithes into rentcharges: see para. 2.13 above.

19 Tithe Act 1836, s.71 "...every estate in any such rent-charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted for such rent-charge" (emphasis supplied).

20 "Land" in an Act of Parliament normally includes hereditaments such as tithes and tithe rentcharges: Interpretation Act 1889 (the one operative in 1936), s.3.

21 This definition broadly follows that in the 1836 Act. In a case in which there is a chain of leasehold interests more than one of which satisfies the tests, the "owner" is the person holding that one of them which is furthest removed from the freehold: Tithe Act 1936, s.17(2).

may be subject to the liability to repair, and it seems that if there are such cases the tenant is liable to the exclusion of his landlord.[22]

Enforcement

3.12 The enforcement of chancel repair liabilities was until relatively recently a matter for the ecclesiastical courts, with ultimate resort to the civil authorities. The churchwardens or parochial church council would institute proceedings in the consistory court and if they succeeded the Chancellor of the Diocese would admonish the rector[23] to carry out the necessary repairs.[24] The procedure is exemplified by the case of Hauxton P.C.C. v. Stevens[25] in 1929. The subsequent history of that case illustrates the ultimate resort to the civil authorities. Mr. Stevens paid no attention to the Chancellor's admonition and in due course found himself lodged in Bedford jail under a writ de contumace capiendo under the statute 53 Geo.3 c.127. There he remained until he had made appropriate satisfaction for his contempt (which included the repair of the Hauxton chancel).[26]

---

22 Of course any tenant may have the burden of the liability transferred from the landlord to himself by the terms of the lease; but that is another matter altogether.

23 Usually, of course, the lay rector.

24 Monition was originally followed, if necessary, by a sentence of excommunication; and as the latter was found to be ineffective (especially against monastic rectors) the ecclesiastical courts developed a remedy of sequestration of the tithes. Sequestration orders appear not to have been made since the 17th century. In Walwyn v. Awberry and others (1676) 2 Mod. 254 the majority of the Court of Common Pleas indicated (in an action in trespass brought by a lay rector against churchwardens who had impounded tithes on the strength of the Bishop's sequestration order) that a sequestration order could not be made against a lay impropriator. The actual decision in the case turned, however, not on the point of principle but on the inadequacy of the churchwardens' pleaded defence.

25 [1929] P.240.

26 See the Report of The Chancel Repairs Committee (1930, Cmd. 3571) which details the writ procedure; and the speech of Sir Thomas Inskip A-G introducing the Second Reading of the Chancel Repairs Bill: Hansard, (H.C.) 1931-32 Vol. 264 Cols. 521, 522.

3.13 The procedures for enforcing the liability having come under public notice in this dramatic fashion, a Committee was promptly appointed to examine those procedures. It reported in 1930[27] and the Chancel Repair Act 1932 was its outcome. By that Act the jurisdiction of the ecclesiastical court in this matter was abolished and a new procedure - still in operation - was created. The parochial church council first serves a notice on the person liable "stating in general terms the grounds on which that person is alleged to be liable ..., and the extent of the disrepair, and calling on him to put the chancel in proper repair".[28] If the chancel is not repaired within one month,[29] the P.C.C. may bring proceedings in the County Court[30] to recover the sum required to carry out the repairs; and if the court finds that the defendant would have been liable to be admonished under the old law it will give judgment for a sum of money accordingly.[31] It does not pay parochial church councils to institute proceedings with undue haste: if the defendant has obviously not had sufficient time in which to carry out the repairs, the court may adjourn the proceedings, and if the repairs are carried out within the time allowed by the court the court is directed to give judgment for the defendant[32] -with the normal consquences as to costs.[33]

---

27 See previous footnote.

28 Sect. 2(1). In the rare case where there is no P.C.C. the liability is enforced by the incumbent and church-wardens.

29 Sect. 2(2), the proviso to which allows the period to be cut down with the leave of the court in cases of emergency.

30 Sect. 3(1).

31 Sect. 2(3).

32 Ibid., proviso.

33 The P.C.C. may moreover be required to give security for costs: County Court Rules 1981, O. 49 r. 2(4).

Compounding the liability

3.14 Section 31(2) of the Tithe Act 1936, under which part of the compensation stock issued in respect of what we called Class (a) tithe rentcharges[34] was issued to the Diocesan authority, operated as a form of compulsory compounding of the rentcharge owner's chancel repair liability. A voluntary procedure, open to any lay rector, had been established earlier by the Ecclesiastical Dilapidations Measure 1923.

3.15 We do not think it necessary to discuss this procedure at any length. The Diocesan Board of Finance is required to estimate the sum which is "reasonably sufficient to provide for the cost of future repairs for which [the applicant] would otherwise have been liable, and also to provide a capital sum the income of which will be sufficient to insure the chancel for a sum adequate to reinstate the same in the event of its being destroyed by fire".[35] In present day circumstances such an estimate must be well-nigh impossible to arrive at with any degree of accuracy; and in the case of any applicant liable to meet the whole cost of repair the sum asked for is bound to be very large. We understand that very few bodies or persons have availed themselves of the opportunity to buy their freedom from the liability under this Measure,[36] and that the provision is now to all intents and purposes a dead letter.

---

34 Para. 2.16 above.

35 Ecclesiastical Dilapidations Measure 1923, s.52(2) as added to by the Ecclesiastical Dilapidations (Amendment) Measure 1929, s.18.

36 The procedure may have been found appropriate by, e.g., Colleges with small apportioned liabilities arising from their ownership of Class (b) rentcharges.

PART IV

WALES

4.1 The Welsh Church Act 1914 disestablished, as from 31 March 1920,[1] "the Church of England, so far as it extends to and exists in Wales and Monmouthshire". Before that date the law relating to the repair of Welsh chancels was precisely the same as that applying to chancels in England; and, in principle, it remains so. We should however note a number of provisions in the 1914 Act because they have a bearing on our subject and introduced Welsh variants.

4.2 Broadly speaking, all Welsh ecclesiastical property became vested in a temporary body known as the Commissioners of Church Temporalities in Wales ("the Welsh Commissioners").[2] This property included many tithe rentcharges[3] held by the Ecclesiastical Commissioners and Queen Anne's Bounty (the Church Commissioners' predecessors). The disestablishment scheme involved a partial disendowment of the Church in Wales and the function of the Welsh Commissioners was to effect a 3-way distribution of the ecclesiastical property vested in them.[4] One part (primarily all buildings, funds held for the repair or improvement of buildings, and private benefactions) went to a new body known as the Representative Body of the Church in Wales; another part, consisting of other property (including tithe rentcharges) appropriated to the use of parochial benefices, went to the County Council appropriate to the parish concerned;[5] and the last part, the balance of the property (including tithe rentcharges not so appropriated) went to the University of Wales.[6]

---

1 Welsh Church (Temporalities) Act 1919, s.2.

2 1914 Act, s.4.

3 In this Act, the expression is not limited to 1836 Act rentcharges but includes all payments in lieu of or in the nature of tithes or tithe rentcharge: s.38(1).

4 1914 Act, s.8.

5 Ibid., s.8(1)(c) and (d). The County Council holds the property on charitable or eleemosynary trusts: s.19(1)(a).

6 On trusts for itself, its constituent Colleges, and the National Library of Wales: s.19(1)(b).

4.3 The first Welsh variant arose out of the transfer of church buildings to the Representative Body. When tithe rentcharges were abolished in 1936 the share of the compensation stock issuable in respect of Class (a) rentcharges to Diocesan authorities went, in Wales, not to the dioceses but to the Representative Body.[7] Furthermore, since the University of Wales is not one of those whose tithe rentcharges fell into Class (b), the rentcharges which fell to that University's lot under the 1914 Act were treated as Class (a) rentcharges and the Representative Body received a share of the stock issued in respect of them. The Representative Body has accordingly succeeded to the chancel repair liabilities formerly associated with the ownership of those rentcharges.

4.4 A second variant was created by the exemption of the County Councils from chancel repair liabilities arising from their receipt of tithe rentcharge under the 1914 Act.[8] Those rentcharges were accordingly excluded from the apportionments of liability recorded in the Records of Ascertainments under the Tithe Act 1936, and the burden of the liability referable to those rentcharges has in effect passed to the other former rentcharge owners and the Representative Body. We should perhaps add that that result did not occur at once. In order that the existing holders of benefices should not be prejudiced by the transfer of their benefices' rentcharges from the Ecclesiastical Commissioners to the County Councils,[9] the County Councils were required to pay sums annually to the Representative Body, to be paid over to the holder of the benefice.[10] While those payments were being made the benefice holder, if previously liable for chancel repairs, remained so.[11] We are not clear as to his position in relation to apportionment under the 1936 Act. But this was a transitional problem and the provision is (we suppose) not now of any application.

---

7 Tithe Act 1936, Sch. 7 Part III para. 1.

8 1914 Act, s.28(1).

9 Via the Welsh Commissioners, as explained in para. 4.2 above.

10 1914 Act, s.15(1)-(2).

11 Ibid., s.15(4).

4.5 Finally, the 1914 Act abolished the jurisdiction of the ecclesiastical courts in Wales, and the ecclesiastical law of the Church in Wales ceased to exist as law.[12] That necessitated the creation of a new procedure for enforcement of chancel repair liability; and section 28(2) provides for enforcement by the Representative Body in the temporal courts "in like manner as if such liability arose under a covenant made with the Representative Body and running with the tithe rentcharge". This provision anticipated by a number of years the transfer of jurisdiction to the ordinary courts in England by the Chancel Repairs Act 1932: and that Act accordingly does not apply in Wales. At the same time we wonder whether the Welsh provision is not somewhat defective, in that chancel repair liability attached to the ownership of land acquired under an inclosure award (for example) seems not to be catered for.

12 Ibid., s.3(1).

PART V

THE DEFECTIVE ASPECTS OF THE LIABILITY - THE CASE FOR REFORM

5.1 In this Part we enumerate what we see as the defects, of one sort or another, in the historic chancel repair arrangements. To some extent they emerge from what we have already said and to avoid repetition we will make free use of references back to earlier parts. We do not seek to suggest that all the defects mentioned are of equal significance - some, indeed, have apparently not given rise to practical difficulties in the past and are rather unlikely to do so - but as full a list as possible will serve to emphasise the number of matters with which a thorough-going reform would properly have to deal; and we suggest that the case for at least some reform effectively makes itself.

5.2 The defects fall broadly into three categories. These are:

A The general anomalies in the arrangements

B Particular uncertainties in the law and practical difficulties arising in applying the law

C The "conveyancing trap".

We accordingly summarise the defects under those sub-heads.

A. General anomalies

5.3 Although, as we have seen, the chancel repair arrangements with which we are concerned originally operated for the benefit of virtually every parish church,[1] that has long since ceased to be true. Only a minority of parish churches are even potential beneficiaries and the line which divides those which qualify from those which do not is drawn by history alone and not on any other, more rational, basis, such as parochial need. The denominational character of the liability is a further anomaly which has become more marked with the passage of time.

---

1 Outside the City of London, at any rate.

5.4 In practice, moreover, the arrangements work haphazardly even as between qualifying churches, because the prospects of actually recovering the cost of repairs from the person or persons liable vary greatly from one case to another. Some parishes are lucky in their lay rector: others are not. Most of the points arising on this fall to be mentioned under the next sub-head but there is one which we will make at once because of its importance in practice. A parochial church council is naturally reluctant to press, or even to make, a claim against a person (perhaps one who is not even nominally a member of the Church of England) who is likely to offer resistance. Quite apart from the risk of incurring costs, the council will be mindful of the damaging effect which an open dispute would have on community relations and the image of the Church generally. It will often be only too easy for the landowner against whom a claim is made to show that he had no notice of the potential liability when he bought the land and accordingly to complain that the council's act is unjust. There is no question but that considerations of that sort inhibit parochial church councils (unless perhaps they are absolutely desperate for funds for essential repairs) with the result that their possession of the right may sometimes not be of any practical value to them.[2]

5.5 The lucky parishes are, in the main, those which have for their rector an educational or ecclesiastical body. The liability of such rectors is not usually attended by doubts and they have traditionally been good payers.[3] Yet to a modern observer the expenditure of money by Oxbridge Colleges on an object which has no connection with education or research appears an odd application of funds. The same can be said of the substantial payments[4] made every year by the Church Commissioners who (as the successors to Queen Anne's Bounty) have as their first

---

2 It is not unknown for diocesan authorities to put pressure on parishes to drop claims which have come under unfavourable notice in the Press. Presumably, in such cases, the dioceses come to the parishes' financial rescue.

3 In some cases they satisfy their liabilities by maintaining insurance cover.

4 Some £80,000 - £100,000 each year.

responsibility the payment and pensioning of the clergy. And as it was forcefully put during the course of the recent debate in General Synod, it is not a little ridiculous that Cathedral chapters should be making payments towards the repair of parish churches while simultaneously appealing to the public for funds for the maintenance of their own buildings.

5.6 There is a further respect in which the liability can be said to be anomalous. So far as we are aware, nowhere else in the law is there to be found attached to the ownership of land a positive liability to do (or pay for) work on other land, that work being in no way for the benefit also of the land burdened, or of its owner. The effect of this anomaly is heightened when one remembers that the liability is subject to no financial limit and is likely to be irregular in its incidence.

B. Legal uncertainties and practical difficulties

(i) Legal uncertainties

5.7 Many of the legal uncertainties existing fifty years ago were (for better or worse) effectively laid to rest by the Courts in Wickhambrook P.C.C. v. Croxford[5] and Chivers & Sons Ltd. v. Air Ministry;[6] but, as we have seen, a number remain. They include doubts relating to:

(i) chancel repair liability in connection with redeemed tithe rentcharges and other similar payments (such as corn rents) in lieu of tithes;[7]

(ii) the effect of the Limitation Act (and its legislative predecessors) on the liability in the event of long non-payment of tithe rentcharge etc.;[8]

---

5 [1935] 2 K.B. 417.

6 [1955] Ch. 585.

7 See paras. 2.26 and 2.27 above.

8 See para. 2.28 above.

(iii) the liability of persons other than freehold owners;[9]

(iv) liability in connection with glebe land purchased from spiritual rectors;[10] and

(v) the sufficiency of the enforcement provisions in Wales.[11]

We also wonder what happens in the event of the bankruptcy of the owner of land, the ownership of which made him rector (or one of the rectors). There appears to be no direct authority on that question but it would seem consistent with principle (and with the terms of the Bankruptcy Act 1914) to hold that the bankrupt's rectorial status passes with the land to which it is attached, first to the trustee and then (if he sells the land) to the new landowner, who will accordingly inherit the chancel repair liability. It would appear to follow that if the parochial church council presents the trustee with a large bill, the trustee would, in an appropriate case, be able to disclaim the land and rectory[12] under section 54 of the Bankruptcy Act. If that happens, the interesting question arises whether the Crown (in whose favour a disclaimer of freehold land operates) will then become liable to meet the bill.[13]

(ii) Practical difficulties

5.8 First, such difficulties are often encountered in connection with chancel repair liabilities arising out of awards under Inclosure Acts. Such awards form an important source of the liability, and they are a

---

9 See paras. 3.8 to 3.11 above.

10 See para. 2.23 above.

11 See para. 4.5 above.

12 Or even the bare rectory.

13 The arguments in relation to "forfeiture" which found favour in A.-G v. Parsons [1956] A.C. 421 do not seem to be applicable. The Crown may be entitled to disclaim a right to forfeit; but it does not follow that it can disclaim the consequences of the trustee's right to disclaim (if he has one).

particularly tiresome source because, as will be remembered,[14] they give rise to liability for the whole of the cost of repair (subject to rights to contribution from other liable persons) and are not legally apportioned. The records of such awards may not always be complete, and where they exist they are probably to be discovered only by searching in county archives. Not surprisingly, such searches are seldom undertaken in the course of an ordinary conveyancing transaction. Even if a search is made it may reveal no more than that there may be a chancel repair liability. The reason for that uncertainty is that it may prove impossible to relate the land in question, as it is today, with any map or plan which may form part of the records. The plan will show fields, newly formed out of common lands around a village or town; and the location of those fields - to say nothing of their boundaries - will often have become unidentifiable as a result of urban development during the past century and a half. The enclosure records are thus somewhat unreliable as a means of ascertaining for certain whether a particular piece of land became rectorial property in that way.[15]

5.9 Furthermore, the same problem in relation to plans can affect the usefulness of Records of Ascertainment produced under the 1936 Tithe Act in respect of chancel repair liabilities flowing from 1836 Act tithe rentcharges. Those Records are supposed[16] to include plans showing the apportionments of the liability between the land in which tithe rentcharges had merged. Insofar as these had been merged between 1836 and 1936, the ability to draw those plans accurately depended on there being adequate land descriptions (normally by plan) in the deeds effecting the mergers. There are, we understand, a number of Records of Ascertainments which are imperfect for want of evidence, or at least for want of evidence still making sense in 1936.

---

14 See para. 3.6 above.

15 Several diocesan Registrars, of whom we made enquiries some years ago, told us that they had come upon this problem; and its existence is well attested in Wales, where Records of Ascertainments often say no more than the number of affected tithe areas are "many".

16 See para. 2.17 above.

5.10 We also have to say that searching the Records of Ascertainments has recently become more difficult. Up to 1977, the Records were held by the Tithe Redemption Office/Inland Revenue because they were essential documents in relation to the collection and redemption of tithe redemption annuities payable under the 1936 Act. Without significantly adding to its burdens, the Office could, and did, provide a postal search service whereby (for a very small fee) enquiries could be made about tithe rentcharge-related chancel repair liabilities. That facility ceased when the tithe redemption annuity work came to an end. The Records of Ascertainments have since been transferred to the Public Record Office, where personal searches only are the order of the day.

5.11 Lastly under this sub-head there is a group of points connected with rights to contribution (which arise primarily in cases where tithes disappeared under enclosure award arrangements) and apportionment (primarily a 1936 Act, tithe rentcharge-related matter).

5.12 Where, as in the Chivers case,[17] the parochial church council calls on one of the lay rectors to do or pay for the whole of the cost of repair, that rector can, as we have seen, obtain contributions from any co-rectors. Such a right to contribution is, as Eyre L.C.B. once put it, "bottomed and fixed on general principles of justice".[18] That means that the basis upon which the amount of contribution in any given case is to be arrived at is not (and cannot fairly be) fixed.[19] Where all the rectorial lands are of a similar character, the parties may readily agree to share costs on an acreage[20] (or, it might be, rateable value) basis. But it is not

---

17 [1955] Ch. 585.

18 Dering v. Lord Winchelsea (1789) 1 Cox 318

19 It is not clear whether the common law right to contribution still exists in this context or whether it has been superseded by the statutory right under s.1 of the Civil Liability (Contribution) Act 1978. But even if that be so, the quantification point made in the text is unaffected.

20 As happened in the Chivers case.

difficult to envisage circumstances in which the basis of contribution could reasonably be a matter of dispute, adding to the cost of resolving the matter. We should add that contribution problems are not to be found only in enclosure award cases: in particular, as a result of the absence of any provision in the 1936 Tithe Act for sub-apportionment, there may have to be contributions between the owners of separate plots resulting from a division of an area of land to which a share of the liability was apportioned in the Record of Ascertainments.[21]

5.13 In some parishes the liability to repair the chancel may present a particularly confused picture because part only of the ancient tithes may have been disposed of under an enclosure award, leaving the remainder to be converted into the tithe rentcharges, and so within the purview of the 1936 Tithe Act. The Record of Ascertainments (and the apportionments shown in it) is liable in such a case to be misleading. It deals only with the tithe rentcharge-related liability and thus does not tell the whole story. So far as the parochial church council is concerned it seems that each of the "enclosure award" rectors remains liable for the whole of the chancel repairs: with the result that as the council will normally take the convenient course of pursuing an "enclosure award" rector, the apportionments appearing in the Record of Ascertainments effectively bind not so much the P.C.C. as the "enclosure award" rector seeking contributions.

5.14 Although apportionment of the liability, as carried out by the 1936 Tithe Act, is plainly unexceptionable in principle - so far as the persons liable are concerned it merely predetermines what would otherwise be their respective unquantified liabilities to contribute - it may be questioned whether Parliament fully appreciated its likely effect on the ability of a parochial church council[22] to pursue its rights. The parishioners are not in any way responsible for the fragmentation of the rectory, and such fragmentation should not prejudice their right to have

---

21 See para. 3.7 above. In such a case, of course, the plot owners will be contributing towards an apportioned part of the liability and not (as in other cases) towards satisfaction of the whole.

22 Or, in Wales, the Representative Body.

their church kept in a state of substantial repair. That can be said to be the case in favour of joint and several liability between co-rectors, enabling the P.C.C. to proceed against any one of them to the full extent. Legal apportionment of the liability undermines the P.C.C.'s position because a claim for the full amount[23] of the chancel repair costs involves proceedings against all the co-rectors. This is likely to be expensive and, of course, there is a risk of partial failure. We believe that it is quite common for a Record of Ascertainments to indicate that the number of landowners responsible, or partly responsible, for repairing the chancel runs into double figures; and the evidence which we have already received from Wales shows that the number can easily run into hundreds. Bearing in mind that the parish itself is now likely to be responsible in part for the cost of chancel repairs,[24] the proportions attributed to each of the landowners may well be very small - so small, indeed, that the chancel would have to be in a truly ruinous condition before it would be worthwhile even to attempt to collect the contributions due from them.[25] In the result, we suspect that legal apportionment of the liability arising from the tithe rentcharge source has, in many cases, had the effect of stifling the parishes' rights.

C. The conveyancing trap

5.15 The matter with which we have to deal under this sub-head plainly qualified for inclusion under A above as one of the anomalies in the system, but it is so important that it deserves a section on its own. We can, however, make the point quite shortly because the defect is so clear that it does not call for much elaboration.

---

23 Or, in a case where part of the liability falls on the parish itself because some of the former tithe rentcharges were of Class (a) (para. 2.16 above), the whole of the balance of the cost of repairs.

24 See previous footnote.

25 The figures for one, apparently typical, Welsh parish show that even the landowner with the largest individual apportionment was not liable to pay more than 65p per £1000 of the total repair costs.

5.16 The trap for a purchaser lies in the combination of two facts, namely, that the existence of the liability may (for reasons which we have already given[26]) be very difficult to discover, and that the purchaser will nevertheless be liable whether he knew of its existence or not.[27] There are several aggravating circumstances: the extent of the liability, in money terms, is unquantifiable;[28] the frequency of its recurrence is uncertain; the purchaser has no implied right of indemnity against his vendor;[29] and if he was unaware of the liability when he bought the land carrying the liability he is most unlikely to have sought and acquired an express indemnity in his contract.[30]

5.17 The chancel repair liability is in a special position in law because it is strictly a personal liability only; but where that liability runs with the ownership of particular land it is in practice so like a burden on the land that it is, we suggest, wrong that the general principles

---

26 See paras. 5.8 to 5.10 above.

27 Hauxton P.C.C. v. Stevens [1929] P.240.

28 This is so whether the liability is apportioned or not. If it is not, the purchaser lays himself open to larger claims and runs the risk of not being able to recover all the contributions due from his co-rectors.

29 Chivers & Sons Ltd. v. Air Ministry [1955] Ch. 585. There is no authority for the proposition that a new lay rector, after completion, can sue his predecessor for dilapidations, although it seems that there was such a right at common law as between incumbents: Wise v. Metcalfe (1829) 10 B. & C. 299; Downes v. Craig (1841) 9 M. & W. 166; Pell v. Addison (1860) 2F. & F.291.

30 If he discovers the existence of the liability between contract and conveyance it appears that he may decline to complete unless the purchase price is adjusted or an indemnity is offered: Horniblow v. Shirley (1806) 13 Ves. 81; Halsey v. Grant (1806) 13 Ves. 73. If the vendor was aware of the liability before the contract was entered into the purchaser may also have rights based on the vendor's untrue answers to questions raised in "enquiries before contract".

applying to burdens on land should not apply to it also. Now under the modern law a purchaser who follows normal conveyancing procedures should not be taken unawares by burdens on the land. He ought to have notice of them either from the title deeds or from physical inspection of the land in question or from the vendor's inability to produce the title deeds or from some readily accessible register. A liability to repair a chancel is not discoverable in any of those ways,[31] and that makes it an anomalous liability.

5.18 We presently take the view that even if it stood quite alone this last defect, the trap for purchasers, is of sufficient significance to merit at least some reform of the law. We accordingly turn to consider the options for reform in our next and final Part.

---

31 The liability may be discoverable by appropriate enquiry before contract; but the vendor will very often be able truthfully to answer "Not so far as I am aware", and no security will lie in that.

PART VI

OPTIONS FOR REFORM

6.1 It follows from what we said at the end of the previous Part that any reform must, in our view, have as its minimum objective the elimination of what we have called the conveyancing trap. There is more than one way of achieving that objective but the basic choice appears to lie between:

(A) technical reforms designed to remove the more unacceptable features of chancel repair liability, while preserving the liability as such; and

(B) a more radical approach designed to abolish the liability, either immediately or after an interval.

The adoption of the first approach would not suffice if the objective is to go much further than the minimum; and the contents of the previous Part suggest that more than the minimum should be aimed for.

(A) Technical reforms

6.2 Central to the problem is the question of "notice": if the repair liability is attached to the ownership of particular land, how is a purchaser of that land to discover the fact during the conveyancing progress? One way might be to impose a positive duty on the vendor to tell him, with (in default) an implied duty to indemnify him. Such a change in the law would, of course, do nothing for those who are now saddled with the liability because it could certainly not be made retrospective. But in our view that suggestion does not provide an acceptable answer. It would be entirely wrong to assume that ignorance of the liability on the part of the purchaser is due to concealment by the

vendor.[1] The fact is that for one reason or another[2] parochial church councils do not regularly enforce their rights, with the result that the land in question may have changed hands on a number of occasions since a claim was last made. Today's vendor is thus almost as likely to be without knowledge of the liability as is his purchaser, and the suggestion under consideration simply transfers the unfairness from one innocent party to another. It does nothing to remove it.

Registration

6.3 It accordingly appears to us that any reform directed only against the unacceptable features of the present law must involve some form of registration of the liability. The liability of a purchaser could in future be made to depend on his having had notice of it at the time when he acquired his interest in the land, and that issue could be made determinable by the state of the register at that date. An examination of this suggestion that registration might provide the core of a solution reveals however a number of questions which (if the suggestion were adopted) would require satisfactory answers. For reasons which will become apparent we do not suggest the answers to all the questions, but we must present the issues.

6.4 The first question is, should the register include all chancel repair liabilities, or only those running with the ownership of land? It will be remembered that the liabilities falling on ecclesiastical bodies and certain educational foundations in respect of their former holdings of tithe rentcharges[3] are not land-connected at all. If the register is to be comprehensive, it would have to be an entirely new register; but if it were limited in scope to land-connected liabilities use could be made of

---

1 Concealment by the vendor may in any event give rise to liability towards the purchaser on the basis of misrepresentations in answering standard enquiries before contract.

2 Often in order not to create ill-feeling; but the rights may easily be overlooked where minor repairs are carried out to the chancel in the course of doing repairs to the building as a whole. In such circumstances a separate bill for the chancel work is unlikely to have been obtained.

3 The Class (b) tithe rentcharges - see para. 2.16 above.

one of the existing registers searched in the ordinary course of a conveyancing transaction.[4]

6.5 On the face of it, the convenience of being able to use an existing register points in the direction of adopting a non-comprehensive registration system for chancel repair liabilities; but such a system would contain a weakness. The unregistrable liabilities of former holders of Class (b) tithe rentcharges would presumably continue notwithstanding their absence from the register, and those ecclesiastical bodies and educational foundations would accordingly remain liable to pay contributions to any lay rector who may have been called upon to do or pay for the whole of the chancel repairs.[5] Such a lay rector would not be able to discover the full extent of his contribution rights from the register[6], yet that must surely be one of the tasks which a register should be able to perform. This weakness is one which could not be overcome without taking steps to bring joint and several liability to an end, thus eliminating the possibility of any one lay rector having to seek contributions from others. The proper way of achieving that would seem to be to do for all "enclosure award" (and similar) cases what the Tithe Act 1936 did for tithe rentcharges - a general apportionment of the liabilities. That would undoubtedly be a monumental exercise and it is hardly realistic to contemplate anyone undertaking it. In any event, if

---

4 Prima facie, this should be one of the registers maintained by H.M. Land Registry rather than the Local Land Register kept by the District Council; but the latter does have one advantage if and so long as the title to the land in question remains unregistered because entries are there made against the land (and not, as is the case with the Land Charges Register, against the name of the estate owner at the date when the entry is made).

5 The situation may arise where part of the parish tithes were disposed of by enclosure awards and part, eventually, by conversion into tithe rentcharges.

6 He would have to go back to the Record of Ascertainments.

such apportionment had to be done before registration it would certainly delay the introduction of registration for a long period.[7]

6.6 The "new registry" alternative also gives rise to subsidiary questions. Should it be constructed and kept on a national basis, or should it be a more local register set up and kept by, for example, diocesan authorities?[8] But the big question about a new register or registers (and the one which might be decisive against adopting that course) is, who pays the cost of setting it up? There will always be some administrative cost over and above what can be recovered from searchers in the form of fees, especially if the volume of use is low.

6.7 The second main question is, who exactly are the lay rectors against whom (or, more likely, against whose rectorial lands) chancel repair liabilities may be registered? We attempted to answer that question in Part II and we summarised our conclusions in paragraph 2.29; but at the end of that summary we indicated that there were certain areas of doubt. Any legislation making chancel repair liability dependent on registration could hardly, with propriety, avoid resolving those doubts.[9]

---

7 A lay rector with an unapportioned liability may now, in effect, get an ad hoc apportionment if the whole of the repair cost is demanded of him by joining all his co-rectors in the proceedings and getting their contributions fixed at the same time (although he will have to bear the burden of any such contributions which in the event prove irrecoverable). But this presupposes that the matter is the subject of litigation; and it may involve an expensive enquiry because the Court could not be expected to determine the respective contributions in the absence of interested parties.

8 If the register were very local and were made the responsibility of the parochial church council owning the repairable chancel, a purchaser might find himself having to search for the register before he could search it. The land in which he is interested may not lie today within the same parish.

9 A further area of doubt - relating to the liability of tenants - emerged in para. 3.10; but that is not relevant to the argument here if registration is against land rather than against individuals. That does not however mean that that doubt would not require resolution if a registration scheme were adopted: see para. 6.9 below and note 13 thereto.

Those who will have to apply for entries to be made on the register ought not to have to speculate as to whether a particular individual is capable of being a liable rector in law (the factual uncertainties are bad enough); and the keeper of the register ought perhaps to have a residual power to refuse to make an entry which has no legal basis. We do not suppose that the necessary degree of definition of the categories of liable lay rectors would prove difficult to achieve. It is unlikely, in our view, that parishes have in practice presented claims based on liability lying within any of the doubtful areas mentioned at the end of paragraph 2.29, and the correct policy decision, taken in the interests of simplicity, might therefore be to declare that no liability exists in connection (for example tithe rentcharges which were redeemed before 1936. We do not imagine that there would be objections to the adoption of such an approach in the present context even if the result cannot, in some cases at least, be reconciled with the principles underlying the liability in the light of its history.

6.8 The third question to be considered if land-connected chancel repair liabilities are to be treated as if they were land charges concerns the process of getting the liabilities onto the register. As with any land charge, the application will be made by the person whose interests are liable to be prejudiced by non-registration. The natural applicants will therefore be the parochial church councils of parishes with chancels repairable by someone other than themselves; and in any parish where all the other liable persons have apportioned liabilities[10] no complication arises (beyond the difficulty which any parish may encounter in identifying all its lay rectors in order to effect full registration). The situation is however not so straightforward in any parish where some or all of the liabilities are not presently apportioned: for example, a parish with one or more "enclosure award" lay rectors. We have already[11] expressed the view that it would be impracticable to carry out nationwide apportionment exercises in advance of the introduction of registration, so

10 I.e. parishes where all the ancient tithes were converted into tithe rentcharges.

11 Para. 6.5 above.

that such a lay rector's liability for the whole cost would continue. In those circumstances it would probably not be necessary for the parochial church council to attempt exhaustive registration: registration of the liability against the rectorial lands of one lay rector alone could suffice to protect the parish's position. The absence of registration against the lands of the other lay rectors would in due course release new owners of those lands from liability at the suit of the parochial church council, and it would also have to release them from any liability to make contributions at the suit of the owner of the registered rectorial land against whom the parish had moved. Lay rectors not having the benefit of an apportionment would therefore be just as interested as parishes in ensuring that as many of the liabilities as possible are duly registered. Furthermore, there can exist circumstances in which even lay rectors with apportionments will be concerned to see that others are not forgotten. Although each of the rectors appearing in the Record of Ascertainments is liable for an apportioned share only, those fractions add up to 1, so the former "tithe rentcharge" rectors are liable, between them, to pay for the whole of the repair costs. If the parish is one in which there are "enclosure award" rectors as well as "tithe rentcharge" rectors, the latter will want to see the former on the register because the "enclosure award" rectors are liable to contribute. Failure to register the liabilities attached to ownership of the enclosure award rectorial lands would eventually cause the burden on the tithe rentcharge rectorial lands to be increased.[12]

6.9 In those circumstances our present view is that it would be necessary to include in any registration scheme a provision requiring notice to be given to the owner[13] of each piece of land against which it is proposed to make an entry, identifying all other land (if any) in respect of which concurrent entries are to be made. That would help to prevent

---

12 Much as the County Council exemption in Wales has had the effect of increasing the burdens on others in the principality: see para. 4.4 above.

13 For this reason, the legislation would have to resolve the existing doubt as to whether tenants can ever be "owners": see paras. 3.8 to 3.11 above.

inaccurate entries being made, and would bring cases of disputed liability to the fore at an early stage; and it would also enable a rector so notified to cause entries to be made against the lands of any other co-rectors, who are not mentioned in the notice, lest contribution rights be lost on a change of ownership by purchase. It would be a matter for consideration whether such notices should be given by the applicant for registration (in which case there would clearly have to be provision for a means of proving that the requirement had been complied with) or by the Registrar. Either way, the requirement would add to costs.

Observations on registration as the core of a solution

6.10 From a purely technical point of view it seems that a system of registration (coupled with the clarifications and simplifications of the law which would be necessary to make such a system workable) could eventually eliminate the worst features of the common law liability. We stress "eventually" because the reform would operate only in relation to purchasers: but it is purchasers who are affected by the principal defect - assuming, as we must for the purposes of discussing reform of the liability, that the very existence of the liability is not to be regarded as the major defect. We have discussed what appear to us to be the main questions upon which decisions would have to be taken if that course were adopted - there are, doubtless, others - and we do not think that they present problems which are technically insuperable. Nevertheless, there is no escaping the fact that while the present law is unquestionably unsatisfactory, the number of instances each year (or even each decade) of things going badly wrong is, so far as we are aware, actually rather small. There is little or nor virtue in taking a procedural sledgehammer to a relatively small (albeit thick-shelled) nut if to do so would be unwelcome to the majority of those affected on both sides of the question.

6.11 It almost goes without saying that registration would not be welcomed by affected landowners. An adverse entry on a register constitutes a blot on the title which any landowner would be glad to be without because it will at the very least present a potential purchaser with a bargaining counter: even if, in the particular circumstances of the case, the entry represents only a small risk. Nor will any landowner

against whose rectorial land an entry is made want to have to do the research which will probably be necessary to enable him to see whether he should himself apply for other entries in order to protect any rights to contributions which he may have.

6.12 We are also inclined to think that most parochial church councils would, on consideration (and contrary, perhaps, to expectation), not regard the adoption of a registration system with enthusiasm. They would undoubtedly be, in general, under a duty to ensure that all the entries necessary to protect their positions for the future were duly made, even if they had, for one reason or another, not made a practice of making claims in the past. We suspect that many parishes are not in a position readily to identify the rectorial land to which liability attaches - especially "enclosure award" rectorial land, which is the most useful from the parish's point of view because of the nature of the lay rector's liability.[14] Since it is to be expected that landowners will, except in the clearest cases, put the parochial church council to proof before accepting an adverse entry against their land, a parish would be ill-advised to attempt to place entries on a register without first having done the necessary research and satisfied itself that it is on firm ground. We have already shown that that exercise is often fraught with difficulty and there is no guarantee that the expenditure incurred will produce conclusive answers. The introduction of a registration system is thus likely to involve the council in expenditure with no immediate profitable objective, and since there is no immediate occasion for the research, the council will not have a proper opportunity of considering whether the game is worth the candle.

6.13 Furthermore, we believe that for some parishes a registration system could prove positively counter-productive. We understand that among those who regularly contribute towards chancel repairs are many whose contributions may be described as "voluntary". The parish may

---

14 The parish may know about "tithe rentcharge" rectorial lands because it may hold a copy of the Record of Ascertainments. But the liability from that source may be so fragmented by apportionment that there are serious collection problems.

have a tradition of looking to the owner of the principle mansion house, for example, for contributions, and for as long as anyone can remember the owner for the time being of that house may have willingly paid on request. The tradition probably has a basis in law in that at one time rectorial land may have been held with the house; but the present state of the records may be such that it is not possible to identify any land now owned by the owner of the house as rectorial land to which chancel repair liability attaches. Nevertheless the liability is accepted - perhaps through a sense of social obligation, but also because the landowner is unwilling to go to the trouble (and incur the expense) of establishing a defence. Such a "voluntary" payer, whose liability rests merely on repute, is rather likely to take a different view of the matter if it were proposed that an entry be placed on a register, thereby putting a blot on his title which will remain there unless and until he can show that the entry should never have been made. Any payments made after he had apparently acquiesced in the making of the entry would certainly look like admissions of legal liability, and it is not to be expected that the landowner will be willing to make any such admission damaging to his (and his successors') long-term interests: even if he is in fact willing to go on paying on an informal basis. There are therefore cases in which the introduction of a registration scheme would have the effect of upsetting existing arrangements satisfactory to the parish, but which the parish may not be in a position to replace.

Provisional conclusion on the adoption of a registration system

6.14 As at present advised we think that there would in general be a preponderance of disadvantage in attempting to deal with the problems arising out of chancel repair liability through a registration system. We acknowledge that many parishes would be able to cope with such a system without difficulty - they are, broadly, the parishes in which there are no real problems today, the liable lay rectors being few in number, the liabilities being clearly demonstrable by available documentary evidence, and so on. But such parishes are, we suspect, definitely in the minority and any reform of the law must have regard to what is generally most desirable. We accordingly turn to consider the alternative approach.

(B) Abolition of the liability

6.15 Up to this point we have been considering reforms to the law about chancel repair liability on the footing that the liability itself is acceptable in principle but that something should be done about its incidents. That approach does not touch some of the defects discussed in Part V because they do not fall within the limited objective which might be attained through a registration system. It is, however, clearly arguable that the limited approach is misconceived and that what is really wrong with the liability is that it has become a total anachronism, the passage of time having brought about its divorce from its historical justification; that it is an anomalous form of liability unlike any other associated with churches belonging to the Church of England and the Church in Wales. On such a view of the matter there can be only one acceptable objective, and that is to rid the law of the liability altogether. Even if one takes a less strong view, the demerits of the law as it stands call for some action. No recommendable line of reform falling short of abolition appears to present itself and abolition must therefore be considered, as an option in default of anything equally satisfactory but less drastic.

(i) Immediate abolition, without compensation

6.16 We do not propose to spend time on this possibility because we do not regard it as an option meriting serious attention. Those parishes to which the right is of practical value have come, reasonably enough, to rely on it; and no matter how strong one's views against indefinite continuation of the present system, it cannot in our view be proper to cut the right off without, at the very least, giving those parishes time to adjust to their loss.

6.17 There is just one point which it is convenient to make at this stage, having a bearing on the extent of the loss which could be occasioned by the abolition of chancel repair liabilities. There exist public funds out of which grants may be made towards the cost of major structural repairs to churches of outstanding architectural or historic

interest.[15] Not every church which has the benefit of common law repairing rights is of such a quality as would enable it to be recommended for such grants, but since the churches with which we are concerned are by definition ancient parish churches it is to be expected that a fair proportion would, prima facie, qualify. However, grants will not be made in the absence of financial need and a church which has the right to call on third parties to repair its chancel will be expected to look to that source of finance before applying for a grant from public funds. Even if the existence of the right does not cause an application for a grant to be refused altogether, the amount of any grant will be affected by it because repairs to the chancel will be excluded from consideration. There is therefore reason to suppose that if the common law right were to disappear, the chances of a number of parishes getting grants in aid of their repair bills would be enhanced; and the enhancement would be proportionate to the extent of their loss.

(ii) Immediate abolition, with compensation

6.18 This possibility can, we fear, be taken equally shortly. It is unrealistic. If compensation is to have any meaning it must be of such an amount as can reasonably be taken to replace the value of the parishes' lost rights in full. We think it safe to assume that public funds would not be available for this purpose, either as a free gift by Government for the benefit of those now subject to the liability or by way of advances repayable by them over a period in the form of Chancel Repair Redemption Annuities. The compensation would thus have to be provided directly by the liable persons and the effect would be to make compulsory the existing provision for compounding the liability voluntarily, under the Ecclesiastical Dilapidations Measure 1923.[16] A compulsory scheme along such lines would magnify the problems which have caused that

---

15 Historic Buildings and Ancient Monuments Act 1953, s.4. The grants are made by the Department of the Environment.

16 Set out and discussed in para. 3.15 above. To apply the existing "joint and several" principle to a compensation liability would be unthinkable.

provision to become a dead letter as a voluntary matter. Furthermore, a nationwide apportionment exercise would be called for, in order to fix the lump-sum liabilities of each of the co-rectors in all those cases where the repair liability is not now apportioned. That is not a feasible proposition. Any compensation scheme would be likely to give rise to cases of genuine hardship; but any mitigation of hardship would cause parishes to lose, pro tanto, that compensation which it would be the sole purpose of the scheme to provide.

(iii) Abolition, without compensation, by stages

6.19 In Part I we said that a scheme for the progressive phasing-out of chancel repair liability, leading to its eventual extinction, was supported by the General Synod of the Church of England at its Sessions in February 1982. The paper before the Synod outlined the scheme in the following terms:-

> "A scheme could be devised which would allow the liability to continue in full force as at present for (say) 5 years from an appointed day, but thereafter claims would be limited to one-half of the liability during the next ten years and to one-quarter of the liability during a final five years prior to complete extinction of the liability 20 years after the appointed day.
>
> It is suggested that there should also be an amendment of the law, to apply during this interim period, so that when the liability is shared between several owners, it should no longer be possible to enforce the whole liability against one of them, thus removing one of the principal sources of grievance amongst those currently liable."

In the following paragraphs we will enlarge on that scheme, the first part of which contains a major and a subsidiary point, and the second some problems which require consideration.

(a) The major point - phasing-out

6.20 There is no disguising the fact that any scheme along the lines indicated above must involve an element of expropriation. This was recognised (and accepted) by the General Synod, but we are conscious of the fact that the immediate responsibility for keeping English parish churches in repair falls at present on the individual parishes and not any central

body. It may therefore be somewhat easier for the Synod than for parochial church councils to take a detached view of the subject. The justification for adopting such a scheme must lie in the desirability of ridding the law of the liability, coupled with the absence of any other realistic means of achieving that end. But we can draw attention to some extenuating factors.

6.21 The impact of the extinction of the liability would clearly not be as widespread as in theory it would appear to be. First, a substantial number of parishes seem not to regard the possession of the right to call on others to repair their chancels as a valuable matter, because they are either unwilling or (for one reason or another) unable to enforce their rights. In practical terms, the Tithe Act 1936 significantly altered the situation for many parishes, partly by transferring the liabilities of some lay rectors[17] to the parishes themselves and partly by limiting the liabilities of other lay rectors[18] to apportioned shares. Secondly, it has always to be remembered that the parishes' right relates only to the repair of part - generally, a relatively small part - of the church, and it is therefore, at best, only of partial assistance to a parish facing financial difficulties in maintaining the building as a whole. The loss of the right would often make little appreciable difference to the parish's ability to meet its bills. In some cases it might actually (if paradoxically) help in the respect, if it removed an obstacle in the way of getting a grant from public funds.[19]

6.22 Although some parishes would undoubtedly end up as losers if chancel repair liability were phased out in the manner suggested, it is permissible to note that Parliament has not infrequently brought about such a result in similar contexts. "Expropriation" is an emotive word, and

---

17 I.e former holders of Class (a) tithe rentcharges: see 2.16 above.

18 I.e. all former holders of tithe rentcharges, other than those of Class (a).

19 See para. 6.17 above. It is apprehended that the amount of a grant may be affected by the existence of a right to claim from a lay rector, even if the parochial church council decides, for reasons good to them, not to enforce the right.

it is true that there is a near-constitutional principle that private rights should not be taken away without compensation. But that principle has not in the past been regarded as sacrosanct in relation to rights which are not private in nature; and, in particular, the Church's rights have often been invaded. One does not have to go back to the dissolution of the monasteries for a precedent. As we saw in Part IV, the disestablishment of the Church in Wales, which occurred within living memory, was accompanied by a measure of disendowment. Some forty years earlier, the Church of Ireland was similarly disendowed, on its disestablishment, but to an even greater extent. For present purposes, however, a more directly applicable precedent may be found in a piece of legislation passed in 1868. It will be remembered that although the rector was liable to repair the chancel, the parish was always responsible at common law for the maintenance of the remainder of the building. In order to raise the necessary funds, the churchwardens could make and levy a compulsory Church Rate, payable by everyone in the parish except the rector (or rectors). That right was abolished without compensation by the Compulsory Church Rate Abolition Act 1868. The preamble to that Act is of particular interest:

> "Whereas Church Rates have for some years ceased to be made or collected in many parishes by reasons of the opposition thereto, and in many other parishes where Church Rates have been made the levying thereof has given rise to litigation and ill-feeling:
>
> And whereas it is expedient that the power to compel payment of Church Rates by any legal process should be abolished:"

That preamble, it seems to us, might properly be inserted (mutatis mutandis) at the head of any legislation about the common law chancel repair liability.

(b) The subsidiary point - the periods

6.23 It may be thought that if the present law is so unsatisfactory that extinction of the liability is called for, the aim should be to accomplish the deed within a period much shorter than twenty years. Indeed, the General Synod had before it an amendment suggesting that the

liability should be reduced to one-half forthwith and to one-quarter after three years, with final extinction after a total of five years. That amendment did not find favour, the Synod evidently feeling, as we do, that those parishes which have come to rely on the present system will require a longer period for adjustment, and indeed, have some right to expect that their problems will be sympathetically regarded. What is needed is perhaps a major review by the Church of the whole question of the maintenance of its buildings (especially the financing of it), but it would be optimistic to think that substantial changes in that area could be brought into effect within a short period. In all the circumstances we are inclined to think that a total period of twenty years would be a fair one. We also think that it makes sense to divide that period up into stages of five (or multiples of five) years each because churches are inspected by their architects every five years[20] and it is therefore proper to assume that parishes will make good any reported defects in the fabric on a quinquennial basis. Unlike the movers of the amendment in the Synod debate, we suggest that the outline scheme is right in providing that the phasing-out process should not start to bite for five years, thus allowing every parish having the benefit of the common law right one opportunity of having its chancel put into a proper state of repair before the process of transferring the responsibility to it begins in earnest. But the total period, and the number and duration of the stages within it, are very much matters on which we would welcome views.

(c) The interim limitation of claims to apportioned sums

6.24 The second part of the scheme outlined in paragraph 6.19 envisages the possibility of an interim solution to the problem arising out of the joint and several nature of chancel repair liability at common law. As we have seen, that problem does not generally[21] arise where the historical source of the liability lies in tithe rentcharges, because those

---

20 Inspection of Churches Measure 1955.

21 The exception indicated by the word "generally" in the text is created by the absence of provision for sub-apportionment where land units existing in 1936 have since been subdivided: see para. 3.7 above.

liabilities were apportioned at law by the Tithe Act 1936 and the Records of Ascertainments made thereunder. For them, the rule limiting the liability of any one lay rector applies already. The suggestion is concerned with the cases where the historical source lies elsewhere - usually in enclosure awards. By definition, therefore, it relates to cases where there is no existing apportionment and it appears to fall into the class of things easier said than done.

6.25 The implementation of the suggestion should give rise to no real difficulty where (i) the full extent of the relevant rectorial land is known, so that all the lay rectors are capable of being identified;[22] and (ii) all the lay rectors are agreed among themselves as to how the liability should be apportioned. If both those conditions are satisfied the whole matter can be settled out of court. But what if they are not, and litigation is inevitable? The court can only effect an apportionment between the parties before it. Upon whom should lie the responsibility for ensuring that the proceedings are properly constituted? If the onus is to lie on the plaintiff parochial church council it would seem that it would face the choice either of instituting proceedings against everyone who might be a lay rector (thereby running the risk of paying the legal costs of any who are subsequently able to show that they are not rectors) or of failing to be able to collect anything from anyone (the defendants which it has chosen being able to show that there may be others who ought to be joined, so that the quantum of their own liability cannot be arrived at). Our present view is that that cannot be right; and that it must be for the defendant or defendants against whom the parochial church council has moved to take the necessary steps to join others with them, if they so wish.[23] On consideration therefore we feel that if the objective aimed at in the second part of the outline scheme is regarded as a desirable

---

22 There is a technical problem here which would have to be overcome. The ownership of land is not a matter of public record.

23 We note from the recital of the facts in Chivers & Sons Ltd. v. Air Ministry [1955] Ch. 585 that there was a third lay rector in that case; but it seems that the Company and the Ministry were content not to trouble him and to share the whole liability between themselves.

transitional measure, the best approach would be to build on the existing right of a defendant to an action to join other parties as co-defendants. Thought would have to be given to the rules applying at the interlocutory stage of the proceedings to ensure that full advantage could be taken of this opportunity. Having got before it as many of the lay rectors as the defendants have chosen to join, the Court could apportion the liability between them and (by a change in the law) that apportionment could be made a legal apportionment binding on the plaintiff parochial church council.[24] The essence of the matter would lie in that change in the law. It is necessary to point out that such a change could well operate to the prejudice of the plaintiff council by creating enforcement problems parallel to those created by the legal apportionment of rentcharge-related liabilities under the Tithe Act 1936.[25] This leads us to doubt whether any change in the nature of the lay rectors' liability during the transitional period would be truly desirable: and as at present advised we would be inclined to leave the matter as it stands during the run-down of the liability. The progressive reduction of the extent of the liability would itself tend to accentuate any problems which a change might create for parishes.

(d) Other interim measures?

6.26 It is, we think, fair to assume that the introduction of a scheme phasing out chancel repair liability would result in an increase in the number of claims being made by parishes, especially during the first five years if the quantum of claims is not reduced during that stage. How many more claims there would be, it is obviously impossible to predict. On the whole we suspect that it would an exaggeration to suggest that claims would proliferate, because the introduction of the scheme would not remove any of the various factors which inhibit the making of claims today. It may be that the overall effect on numbers would prove to be marginal. Nevertheless, it has been suggested that parishes may feel obliged to pursue their rights while they can, and may therefore present

---

24 If this change in the law were adopted, contribution claims (as such) would rarely arise; but the right would remain - e.g. in a case where a single lay rector had paid in full on the parochial church council's request, as Chivers & Sons Ltd did.

25 See para. 5.14 above.

claims which hitherto they would have refrained from making. In those circumstances, the question arises as to whether "hardship" should constitute a ground of defence, or a basis on which a measure of discretionary relief could be given. "Hardship" is a notoriously difficult concept to handle and it seems to us likely that the process of having its existence established would only exacerbate it. Greater use of the right to join co-rectors in proceedings, with a view to getting an apportionment, would probably to a long way towards dealing with the most obvious present source of hardship, and we are disinclined at present to suggest that anyone should be empowered to mitigate a parish's claim.

6.27 A further reason for not giving legal recognition to hardship claims - and this applies equally to any further modifications of the scheme having the effect of weakening the parishes' positions - is this. In the long run, landowners will be the gainers from the extinction of the liability, and individual parishes will be the losers. We put forward the scheme outlined in paragraph 6.19[26] because it is our present view that it is a fair scheme which strikes a reasonable balance between the interested parties. Modifications would upset that balance. In particular, it seems to us that it would be illogical to give parishes the benefit of a reasonably lengthy period in which to adjust themselves to the loss of their rights, while at the same time erecting obstacles in their way of taking full advantage of it.

PROVISIONAL CONCLUSION

6.28 We can summarise our present views as follows:

(1) Even if we considered that chancel repair liability should continue indefinitely on its present basis (as we do not), it is abundantly plain that some reforms are called for. It appears that the keystone of a reformed system would have to be some form of registration of the liability. We do not believe that the introduction of registration requirements would be welcomed either by parishes or by landowners, and we would on that ground alone not adopt a limited approach to the problem.

---

26 The second part of which should be read with para. 6.25.

(2) In any event we are on the whole of the opinion that the very existence of the liability is not now justifiable and that the proper approach is accordingly not to reform the liability but to abolish it. Immediate abolition cannot properly be suggested because compensation for parishes would appear to be out of the question. The only practical alternative which remains is a phasing-out of the liability over a period of years. During that period there should be no major alterations in the law apart from progressive reduction of the extent of parishes' rights: such alterations would tend to defeat the purpose of having a transitional period and might even produce in practice the same effect as immediate extinction. For the same reason we consider it important that there should be no diminution of the extent of parishes' rights during the first stage. We commend the adoption of the following timetable:

During years 1 to 5: no statutory limitation on the amount of repair costs recoverable.

During years 6 to 15: recovery of repair costs limited to one-half of what may now be recovered.

During years 16 to 20: recovery of repair costs limited to one-quarter of what may now be recovered.

The liability extinguished thereafter.

From the start of year 6, it would be inappropriate to allow parishes to call on liable persons actually to carry out necessary repairs and the procedural provisions contained in the Chancel Repairs Act 1932 would accordingly require adjustment.

(3) We accept that the joint and several nature of the liability at common law may bear hardly on those landowners who do not have the benefit of an apportionment of their liability. Nevertheless, we incline to the view that the nature of the liability should not be altered during the transitional period. The implementation of the recommendation at paragraph (2) above would reduce the burden; and it is open to defendant landowners to take steps to minimise the consequences of joint liability by joining other parties. The statutory enforcement procedures must, however, not be such as to impede such steps. We accordingly suggest that when the Chancel Repairs Act 1932 is amended care should be taken to ensure that the procedural steps laid down will facilitate (and indeed encourage) the bringing together of all the lay rectors from whom contributions would be sought, so that appropriate apportionments may be made before any judgment is given. We would only add that the enforcement position in Wales should not differ from that in England.

Printed in the UK for HMSO
Dd 736854 C15 9/83